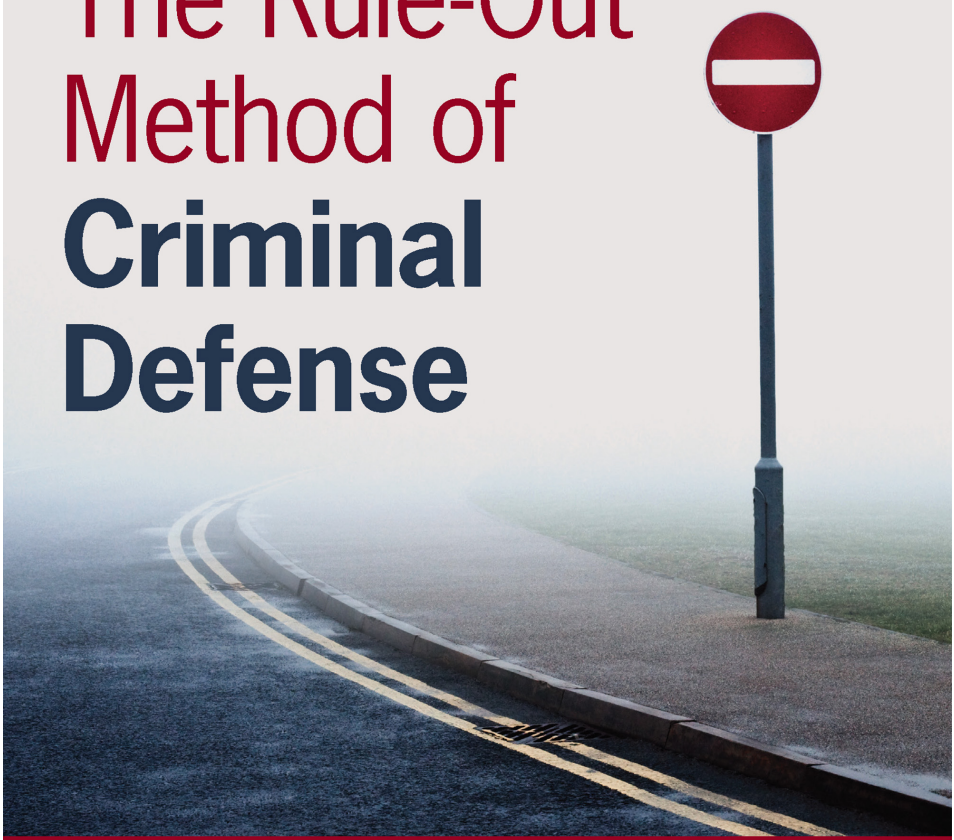
The Rule-Out Method of **Criminal Defense**



David Ball
with Elliot Abrams, Emilia Beskind, Edward P. Capozzi, Roger J. Dodd, Richard S. Jaffe, Artemis Malekpour, Susan Seahorn, Shannon Tucker

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The harder it is to convict someone, the more secure we are in our freedom and the integrity of our justice system.

—Justice Benjamin N. Cardozo

A fight? You think I'm going into court to make a fucking statement? You think Shue gives a shit if we go down, but go down nobly?

This is a man looking at 40 years of hard time. He could have had a deal and been out in five, but he bet it all on me. Don't give me that yuppie bullshit about a good fight. This isn't fucking Yale. A good fight is the one you WIN.

—*True Believer* (screenwriter Wesley Strick)

To those who should not have been convicted and to those who tried to prevent it.

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Foreword

This book is a game changer. It will change your approach to trials, our profession, and the fate of countless defendants. It brings defense advocacy back to its intended strengths.

An ominous reality looms over our profession: well over two-thirds of state juries convict. 98 percent of federal cases end up in convictions. Far too few trials result in favorable results for our clients.

Needlessly.

Long aware of these daunting facts, jury researcher and consultant David Ball, heralded as among the nation's most influential strategists for civil plaintiffs, began researching why the state so easily convicts and—this book's purpose and accomplishment—what we can do to reverse this dangerous and often unrecognized landscape. From many years of interviewing ex-jurors, two chief factors became obvious to David. First, jurors rarely follow the law, because they don't understand it well enough. Jury instructions are confusing, especially but not limited to those involving reasonable doubt. Second, most jurors come to court already motivated to convict—a motivation that can often be traced back to their personal fears and concerns for the safety of their families, as well as their fears about rising crime. Other factors also significantly contribute. David's challenge evolved into developing an approach to trials that takes these factors into account and reverses them into acquittal forces. If that sounds abstract, the book makes it clear, concrete, and easily applied. That's why it's a game changer.

Chief among the lessons of Rule Out is that too many convictions happen because defense lawyers inadvertently invite them. Almost all the teachings of our profession, its books, seminars, gurus, paragons, and accepted wisdoms unintentionally play into the

hands of the state. David's research verified early on what a few skilled criminal practitioners already knew: that most defense lawyers try their cases in ways that undermine the magnificent legal protections instituted by our nation's founders. David's research revealed, among many things, that in deliberations, jurors usually spend little or no time discussing burden of proof or reasonable doubt. Instead, they focus on which side presented the "better" case, or on whether the defendant proved they didn't do it, or on bias-driven gut reactions, and on other issues that have nothing to do with deciding whether the state passed its constitutionally mandated test of proving its case beyond reasonable doubt.

Rule Out gives us an alternative to the prevailing norms and guidance that overwhelmingly fail, especially when the accused does not have enormous resources.

Why continue doing what manifestly does not succeed? And what can we do instead? These questions lie at the heart of the Rule-Out method, and this book puts the answer into the profession's hands. Rule Out is quickly understood and not difficult to apply, except that breaking old habits will be a bit of a challenge for some. A refreshing challenge, as you'll see.

Rule Out brings jurors willingly, even enthusiastically, back into the realm of the actual law. It minimizes biases, juror errors about law, emotional and nonlogical decision-making, and, ultimately, convictions.

David's landmark best-selling *David Ball on Damages* changed how plaintiff's cases are tried, and it engendered a renaissance of books and seminars on trial strategy from some of the nation's best plaintiff's attorneys. David's later books—including *Damages Evolving* (written with Artemis Malekpour, who's part of this book, as well as Nick and Courtney Rowley), *Reptile* with Don Keenan, *Theater for Trial* with Josh Karton, and others—have led the way to restoring justice to the civil side of trial law after years of tort "reform," the massive poisoning of the nation's civil jury pool. In this book, David finally does the same for criminal defense.

I have used the core principles of Rule Out for years. The Rule Out method elevates the burden of proof, the sacred presumption of innocence, and the central question of reasonable doubts to the forefront of jury deliberations. Indeed, the method dramatically changes the mindset of jurors who routinely shift the burden of proof to the defendant when the Rule Out method is not employed. Rule Out makes jurors *want* to evaluate *only* on the basis of reasonable doubts.

This book rests on 25 years of David's research followed by five or six years of experience in the trenches that refined, advanced,

confirmed, and simplified the Rule-Out method. David quickly covers the method's underlying principles; Raleigh attorney Elliot Abrams provides a succinct and well-documented legal basis for the principles. David, along with Chapel Hill, North Carolina, attorney Emilia Beskind (among the first to use Rule Out); one of North Carolina's most experienced and respected assistant public defenders, Shannon Tucker; and cross-exam guru Roger Dodd, provides step-by-step guidance for applying Rule Out throughout trial. This includes everything from specific voir-dire questions through the necessary ingredients of closing. One of New Jersey's best-regarded plaintiff's attorneys, Edward P. Capozzi, contributes his domino demonstration that frames your entire trial's law and evidence around the hub of reasonable doubts. North Carolina public defender and consultant Susan Seaborn provides a model of finding a case's reasonable doubts, using sex assault cases as her example. Artemis Malekpour, another of the nation's best trial consultants, explains how to use focus groups—even with little money—to find reasonable doubts you'd otherwise miss. And I've done my best to reinforce Rule Out's barricades against burden shifting. I've also included a section on how to defuse the considerable biasing force of the myth that an indictment returned by grand juries carries any weight at all.

I have been honored on a number of occasions to assist David in presenting the Rule-Out method at various conferences and training sessions for criminal defense lawyers. Initially, David had not settled on a name for his ingenious system until I suggested Rule Out. Simply put, Rule Out is what the Constitution requires, and it's the heart of David's longtime research underlying the system he designed.

Lawyers using this brief book quickly see that it changes the focus of juror attention and energy in trial into testing not the accused but the state, the only test the founders wanted. This offsets the state's immense power and the epic misconceptions most jurors have grown up with and carry into trial.

Ultimately, this is not just a book. It's a campaign to restore American trials to the intent of the founders. It brings trials back to the framework of law so long dormant in our criminal trials. It motivates jurors to follow the law and thus honor their oaths in carrying out the responsibility for which our founders designed the system.

David and the rest of us involved in this book want to see real law, not a TV version of it or the state's version of it, control case outcomes. And because Rule Out results in favorable verdicts, it

empowers lawyers to take more cases to trial, as the Sixth Amendment intended to be the heart of the criminal justice system. It is far past time that we restore the core of the Sixth Amendment, which has been routinely and severely compromised, practically bullied out of existence by "trial penalties." Rule Out revives the Sixth Amendment and all its benefits—especially its intended power to raise effective barricades against convictions.

David's commitment to achieving justice and designing a system to bring the Constitution back to the criminal justice system will become evident to anyone who reads this groundbreaking book. His commitment is highlighted by his direction that all royalties from this book go to providing copies for public defender offices and other public-service defense lawyers. The motive that drives David is to end America's—and the defense bar's—shame of winning the "who's got the most prisoners?" contest among nations.

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Birmingham, Alabama

Preface

This book is about the Rule-Out method of criminal defense. The method, easily learned, gets most jurors to decide verdicts based solely on reasonable doubt—which, perhaps unexpectedly, few jurors actually do. *Most* convictions result from burden shifting, which is the expectation and demand of jurors for the defense attorney to prove things. Rule Out prevents burden shifting by making the case an exclusive battle about reasonable doubt.

Rule Out also teaches you how to find and show plentiful reasonable doubts that counsel most often misses and how to avoid common practices that cause most convictions.

Part 1 of this book covers Rule Out's underlying concepts. Part 2 is Rule Out's applications workbook: how to do it.

Within Part 1, Chapter 1 introduces what Rule Out does as well as how and why it works.

Chapter 2 shows how Rule Out minimizes—and can even eliminate—racism in juror decision-making.

Chapter 3 warns about—and explains how to avoid—the cause of more convictions than everything else put together: the common error of intentionally or inadvertently leading jurors to think you're required to prove innocence.

Chapter 4, from Alabama attorney Richard S. Jaffe, reinforces Chapter 3's warning about burden shifting and introduces Rule Out's power in achieving lesser included defenses.

Chapter 5 reviews the surprising number of ways reasonable doubt blocks conviction when used within the Rule-Out method.

Chapter 6 shows how the flaws, weaknesses, and fabrications of forensics (the "garden of reasonable doubts") and junk science wield undeserved prosecution power and explains how to flip that power to the defense—even when it comes to DNA.

Chapter 7, by Raleigh attorney Elliot Abrams, introduces the

legal basis for the Rule-Out method. This clarifies the method and protects your right to use it.

Part 2 of this book, Chapters 8 through 14, includes explanations and practical examples of Rule Out at work. Part 1 is absolutely prerequisite to Part 2: do not try the methods in Part 2 until you understand the concepts in Part 1.

Within Part 2, Chapters 8, 9, 10, 11, and 12 cover, respectively, voir dire, opening, direct exam, cross-exam, and closing. Emilia Beskind (North Carolina) provides voir dire examples. Shannon Tucker (North Carolina) provides an opening exemplar, cross-examination master teacher Roger J. Dodd provides the basis of Rule-Out cross-examination and a streaming video cross-exam demonstration, and the chapter on closing includes Rule Out's irresistible dominos demonstration, adapted from the civil plaintiff's causation demonstration invented by Edward Capozzi (New Jersey), who also provides a streaming video demonstration of its use in criminal closing. The Dodd and Capozzi videos, and a growing collection of other Rule-Out demonstration videos, can be streamed at https://www.malekpourball.com/.

Chapter 13, by attorney and trial consultant Artemis Malekpour (North Carolina), covers the all-important topic of using focus groups for finding more reasonable doubts than you'll find on your own, as well as other information crucial to optimum defense execution. Artemis covers inexpensive, even free, ways to do simple focus groups and provides examples of how they work.

Chapter 14, by attorney and consultant Susan Seahorn, provides an overview of reasonable doubts in Rule Out in sex-crime cases. This specialized chapter shows how to analyze every kind of case to find its reasonable doubts.

You can start using Rule Out as soon as your next trial. You'll soon find yourself developing refinements and new ways of improving it as well as adapting it to meet the approval of resistant judges. Please share your innovations with us to spread the word.[1] The American justice system has long been a repository of America's worst ills, such as its ever-growing imbalances of power and resources, its public misconceptions and pathologies, its racism and every other kind of cognitive and societal bias, and the self-serving drives of its government officials. Rule Out won't fix the nation's ills, but it neuters their effects in trial and gets jurors to make their decisions strictly by the law. This is your goal in trial as well as in the discharge of our collective duty to protect everyone accused. To that end, we want whatever refinements and inventions you develop as you use Rule Out.

It's best to read this book with your next trial in mind and to review it with each subsequent trial. Share your innovations. We can help each other to turn the lights back on in the courtroom.

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1. jurywatch@gmail.com or artemis@consultmmb.com. You are also invited to use these emails for your questions about Rule Out.

Acknowledgments

Thanks to Chuck Zauzig, Donald H. Beskind, Duke [University] Institute for Brain Sciences, Eric Oliver, Joshua Karton, Justin S. Kahn, Katharine M. Wilson, Pate Skene, Susan Pochapsky, Susan Macpherson, and Thomas Hudson.

Thanks to the ex-jurors who explained why their juries convicted.

Part 1

Concept and Principles

Chapter 1

What Is Rule Out?

Source

Rule Out is based on two decades of one-on-one and group research with ex-jurors and jury-eligible citizens along with years of work on criminal cases across the country, worldwide neuroscientific research into persuasion and decision-making, and, as of this writing, seven years of successful application and refinement of Rule Out in practice.

Purposes: What Does Rule Out Do?

Rule Out tests the government's case, not the defendant's, by showing jurors that **to convict, the prosecutor must rule out every reasonable doubt about every fact the state is required to prove**.

Rule Out makes jurors understand that to convict, the state is required to **rule out every reasonable doubt** about *every* fact that the state must prove. Rule Out gets jurors to insist on holding the state to that requirement and to steadfastly reject the influence of jurors who don't.

Rule Out demonstrates that a **reasonable doubt is the logical possibility that the state might be wrong about a fact** it must prove to convict.

Rule Out removes the "Did he do it or not?" question.[1]

Rule Out restores trial to its original purpose: a test not of the defendant but of the state's ability to prove its case. This diminishes focus on the defendant, which you'll see has many benefits.

Rule Out finds and activates many more reasonable doubts than does focusing on trying to prove innocence.

Rule Out gets jurors to evaluate the case *solely* on the basis of reasonable doubts. To this end, whether or not you can ask the jurors' rights questions (p. 96) in voir dire, be certain to use their content in closing. Nothing is more important, because it makes jurors want to follow the law—including about beyond reasonable doubt.

Rule Out stops junk science and shaky forensics.

Rule Out removes the jurors' common expectation that defendants have to prove innocence. Just explaining it does not work.

Rule Out changes the jurors' traditional binary of guilt/innocence to *guilt/not necessarily*.

Rule Out enforces the law on burden by getting jurors to make decisions that are based on close attention to the specific and logical reasonable doubts. Without Rule Out, jurors base their decisions on overall generalized impressions of the case as a whole, rather than on the strictly logical effect of reasonable doubts about specific facts that the state must prove. Further, overall-impression decisions lead to verdicts based on which side the jurors think has the "better" case, not whether the state's case is beyond reasonable doubt.

Rule Out gets each juror to make the other jurors follow the law, especially about burden.

Rule Out demonstrates—leaving little to explain—the meanings and effects of reasonable doubt, beyond reasonable doubt, presumption of innocence, and other legal points. (Explanation carries little weight with jurors; demonstration shows jurors the rules of the game and gets jurors to play by them.)

Rule Out drives jurors to actively and aggressively seek for reasonable doubts.

Rule Out makes jurors *certain* when they're seeing reasonable doubts, so they're unlikely to fold.

Rule Out's basis of reasonable doubts creates clean and simple deliberations that ease the path to blocking conviction. In stark contrast, guilt/innocence battles are messy, multifaceted, polarizing, and likely to convict.

Question: What's harder than being a defense lawyer who needs to prove a defense fact is false? **Answer**: Being a prosecutor who needs to rule out every logical *possibility* that it might be false. (You can't prove it will rain next Fourth of July. But the state cannot rule out that it might.)

Rule Out makes reasonable doubt your central theme. *Everything* you say, do, and show relates directly to it.

Reasonable Doubts about Your Side's Case?

Welcome them! Reasonable doubt about a point made by a defense witness means it might be wrong. "Might be wrong" also means "might be right"—which means there's reasonable doubt about the state's testimony on that point.

Thus, when it comes to any fact that the state must prove to convict, it's not enough for jurors to think the state's expert is more likely right than ours, or even far more likely right, but that our expert is wrong beyond reasonable doubt. Jurors almost never know this, so they improperly convict.

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1. Instead of *rule out* you can say *prove out*, *prove away*, *get rid of*, *eliminate*, and so on. *Rule out* is best, but have others ready to go in the event a court won't allow you to say it.

Chapter 2

Racism

Rule Out makes the effects of racism and other identity-based biases go dormant in deliberations. (I use *racism++* to mean bias against every kind of group.)

You cannot fix the racism++ that greases the path to arrest. But you can substantially deactivate racism++ as a verdict factor. You can do this because the attorney who controls juror attention controls the verdict. Rule Out applies this axiom in many ways, including to the plague of racism in the justice system. The flaws of the law-enforcement and justice systems disproportionally affect Blacks and other minorities. While nothing eliminates racism++, Rule Out provides the defendant's best—and last—chance to fight it and win. This is because Rule Out uses a fundamental principle of decision-making: *humans make decisions mainly according to whatever their attention is on when deciding.*[1]

Rule Out, as you'll see, never tries to prove innocence. Trying to prove innocence, you *force* juror attention onto the nature of the defendant, which includes race++. That bonds race++ to the decision-making process.

But Rule Out transfers juror attention from the defendant (and the defendant's race++) onto the government's ability to rule out the reasonable doubts. This attention transfer minimizes the effects of race++ on juror decision-making because nothing about the defendant helps the juror decide whether the state has enough evidence to rule out every specific reasonable doubt. *The nature of a task controls the attention.*

Does this work every time on every juror? No, nor need it. But it normally works on enough jurors to minimize and even eliminate the effect of race++ on verdicts.

Too good to be true? Not at all. Look at sports. A boxer pays attention solely to hitting opponents as hard as possible. No boxer—not even a racist++ boxer—holds back just because the opponent is white; nor does the racist++ boxer go full blast only against nonwhite opponents. The racist++ football player does not tackle white runners any less fiercely than Black ones. Racist++ pitchers don't throw faster fastballs or spittier spitballs to Black batters. An opponent's color—and all else except athletic prowess—is rarely on the table. The athlete's *attention* is always on winning, not on expressing their racism++.

Rule Out's tight focus on testing the state's case has a similar effect on the jurors' attention, and for the same cognitive reasons.

Not many prosecutors are racist++, however easy it may be to think they are. But the consequences of racism++ don't require racist++ actors. The consequences are in motion long before the prosecutor shows up. Those consequences, built into the system, are inseparable from everything that happens from long before arrest through to trial—at which point it becomes your job to derail them. Rule Out enables you to do it.

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1. Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, *Cognitive Psychology* 5(2), 1973, pp. 207–232.

Chapter 3

The Warning

Trying to prove innocence is a bridge too far. Much too far, and the cause of most trial convictions.

Regardless of jury instructions or your explanations, **when you do or say anything that promotes or even seems to promote innocence, jurors assume you are required to prove innocence to win**. And your chance of proving innocence is less than 10 percent of your chance of acquitting by reasonable doubts.

Do nothing, say nothing, imply nothing that can create the impression that you're trying to prove innocence.[1] Never promote or even seem to promote innocence. Merely having innocence on your mind blinds you to many reasonable doubts.

NO: "John was not in Boston."

YES: "John could have been elsewhere."

Rule Out jurors will know that "could have been [or *might have been* or *maybe was*] elsewhere" is a reasonable doubt.

Promoting innocence means saying anything that jurors could take to mean you're trying to prove innocence. "John was elsewhere" promotes innocence. "John could have been elsewhere" safely and effectively promotes reasonable doubt, forcing the state to rule out that possibility.

Your witnesses can make innocence contentions as long as you don't seem to push them to. "I definitely saw John elsewhere" is fine when you echo it as just a possibility: "No matter what we think about who's right or wrong, John could have been elsewhere." Or "Our expert, Dr. Smith, testified that the blood is not John's. Agree or not, his testimony is logically possible. That's reasonable doubt."

Some books, teachers, and icons of the profession disagree. They

prefer selling our witnesses as correct. This do-or-die approach too often dies. If those folks were right, we'd not be losing between two-thirds and 98 percent of all jury trials.

Defense attorneys promote innocence for various reasons: macho impulse, mistaken belief it's good strategy, fear that jurors won't acquit unless you prove innocence, fear that jurors won't acquit on the basis of the legal "technicality" of reasonable doubt, wanting to demonstrate belief in their client, inadvertence. But the numbers don't lie.

"Yeah, reasonable doubts, OK, but don't I have *to believe in my client?"* Most trial lawyers do their best work when they believe in something. But find something other than your client to believe in, such as the puniness of the government's case. Or your sacred task of putting every prosecutor to the most difficult possible test. Or anything else that drives you (other than your fee). For help with this, see, for example, Rick Friedman's remarkable *The Way of the Trial Lawyer: Beyond Technique*.[2]

Why is this warning pivotal? Humans (and many animals) model what they do on what they see others try to do. So jurors who think that you're trying to prove innocence will model their decision-making on it. It's not about what you *say*, it's about what jurors think you're using your words to *try to accomplish*.

Need proof? Beyond-reasonable-doubt proof? OK, here's BRD proof.

Let's say you never heard of basketball. I take you to your first game. I explain—and you perfectly understand—that the game's object is to *bounce the ball off the backboard without the ball dropping into the basket.* I repeat to be sure you get it right: bounce the ball off the backboard *without* the ball dropping into the basket.

You're an attorney, so I even give you my explanation in writing for reference as you watch the game.

As you watch the game, you see what the players are actually *doing*: *trying* to get the ball *into* the basket, congratulating each other when they do, and trying to keep the other side from doing it. So what do you conclude? That they're all trying to lose? Obviously not. You conclude that despite what I told you, the game's object is to *get* baskets, not to avoid them. No one in the world can convince you otherwise. Your eyes saw what your eyes saw.

Brains being what they are, as you watch the game and notice the contradiction, you do what jurors do when they think they see you trying to prove innocence: they ignore the explanations from you and the court and instead act on what they see the players trying to do. We know this because jurors tell us and it's reflected in

their verdicts.

In the mid-1990s, shortly after I began researching why juries convict (and on the heels of O.J. Simpson's murder acquittal), I watched F. Lee Bailey's masterful cross of a North Carolina jailhouse snitch. Jurors later told me, "Bailey definitely showed us the snitch was lying—but he never *proved* it." Counsel's careful and clear explanations and the jury instructions played to deaf ears. Instead, when Bailey insisted the snitch was lying (and not offering it as just a reasonable doubt), jurors assumed Bailey was required to prove the snitch was lying—and by extension was required to prove all else said on behalf of the defendant.

So the jury convicted. For 25 years, countless jurors have told me that same reason for convicting.

Write a contract with yourself specifying that sponsoring innocence is outside your job description, so that you're strictly forbidden to even try. (For extra motivation, the contract should require you to send me $25 every time you do or say anything that can be taken to mean you're trying to or want to prove innocence.) Adhere to that agreement as if your client's freedom depended on it, because it does.

If you get more of a kick out of trying to prove things, your local D.A. might be hiring. So let jurors see that you're not trying to prove innocence but to show reasonable doubts. That will tell them that reasonable doubts mean you win, especially when they hear the law from the judge and it matches. That makes reasonable doubts into the rules of the game that most jurors will follow, assuming you're using Rule Out.

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1. M.J. Fryling, C. Johnston & L.J. Hayes. Understanding Observational Learning: An Interbehavioral Approach, *Anal. Verbal Behav.* 27(1), 2011, pp. 191–203. doi: 10.1007/BF03393102. PMID: 22532764; PMCID: PMC3139552.

2. Published by Trial Guides.

Chapter 4

Burden Shifting and Lesser Included Defenses

By Richard S. Jaffe[1]

Burden Shifting

At the heart of Rule Out lies the antidote to burden shifting, perhaps the most pervasive and unrecognized mistake that even the most skilled defense lawyers make. Burden shifting occurs when the defense lawyer, often unwittingly or unknowingly, assumes the burden of proving the client innocent. In essence, this turns the Constitution on its head by not requiring the prosecution to prove beyond a reasonable doubt every fact necessary to convict. It's as if the defense lawyer tries to carry a huge boulder up a steep hill instead of making the prosecutor do it, as the law requires.

When the defense seems to accept any burden to prove anything, jurors won't presume innocence. Many years of jury studies show that prospective jurors do not understand that the accused is presumed not guilty and that unless the prosecution proves its case beyond a reasonable doubt, the presumption is not overcome, requiring jurors to return a verdict of not guilty. In fact, in practice the presumption of innocence is a fiction. Instead, jurors and most of the public presume guilt.

This reality, often an unconscious bias, can be easily exposed during voir dire and often is. When a panel of prospective jurors is asked if they each presume the defendant innocent, almost all agree. But when asked, for example, if they'd need the accused to testify for them to acquit, several will indicate yes and many others

who agree will just stay silent. Most defense lawyers, or the judge, then pivot to explain that the Fifth Amendment says the defendant need not testify or even offer any evidence and that not testifying cannot be weighed against them. To prospective jurors this admonition sounds formalistic and routine, so it does not dissuade their presumption of guilt.

Accordingly, the defense lawyer must go a step further in voir dire to point out that expecting the accused to testify or even offer evidence is actually presuming guilt and not innocence. But even this is not enough. This book points out the various ways counsel can still make jurors believe that the defendant must prove innocence. This is a burden shift. The defense lawyer must be on heightened vigilance at every phase of trial to prevent it. It's the main culprit that causes many winnable cases to be needlessly lost.

No juror should ever try to decide whether the defendant is innocent. Trial must not come down to a binary innocence-or-guilt choice or which side presents a more persuasive version of the events. Rather, trials must *entirely* focus on holding the prosecution to its burden.

A potent source of burden shifting is the loaded and misunderstood notion of the term "indictment." When a grand jury has indicted a citizen, most people think there is a valid basis—real and substantial evidence—to support it. But that's far from the case, especially in state courts. Long forgotten is that historically grand juries were instituted to provide a layer of protection for the accused by having a group of citizens "investigate" the basis and merit of the proposed charge(s) before deciding whether to return a "true bill." Sadly, the grand jury process has devolved into a political power tool for prosecutors, who now totally control it with no safeguards or judicial oversight into its workings. The adage that a grand jury would indict a ham sandwich is barely an exaggeration. With few exceptions, if a prosecutor wants an indictment, the grand jury will indict.

When we can tell jurors (such as during voir dire) that the grand juries generally hear just a few minutes of mostly hearsay evidence from the prosecutor, not a word from the defense (who's not even there), and that there's no meaningful inquiry or investigation, the indictment's burden-shifting power vanishes like hot air from a busted balloon. The revelation is a surprise, and at that point the indictment's burden-shifting power dies. By using the previous suggestions and this book's other methods for defense attorneys to prevent burden shifting, defense counsel can make sure it stays dead.

Lesser Included Offenses

Lesser included offenses are often the defendant's salvation. But this advantage is often lost when the defense attorney tries to prove innocence, making deliberations into a guilt/innocence debate. That takes juror attention off any lesser included offense, so it does not occur to them that the lesser included offense can resolve their debate about the main offense.

In other words, while debating guilt/innocence on the main offense, jurors pay little if any attention to a possible lesser alternative, essentially taking it off the table. Letting this happen is dangerous and an unnecessary gift to the state.

In contrast, Rule Out focuses juror deliberation almost entirely onto reasonable doubts. Jurors look for and debate about reasonable doubts attached to every separate charge element of the main offense. This includes elements that don't exist in the lesser included offense—the most common being intent.

With this focus, the lesser included offense is back on the table, where jurors will likely use it to resolve their debate about intent. Intent is back and the main offense is gone.

In brief: a guilt/innocence-oriented jury would probably never think about the lesser included offense, but Rule Out points them right at it.

So for example, a guilt/innocence binary, the result of counsel's attempt to prove innocence, takes focus off reasonable doubts about, say, whether the defendant *intended to sell* the drugs. Rule Out directs their focus onto that intent, putting the lesser included offense squarely in front of them as the solution to their intent debate. So they acquit on the main charge and go directly to debating reasonable doubts about the lesser included offense: using, not selling.

It's the same with a rape case: with Rule Out, the jurors will likely resolve and discard their debate over penetration or force and go to the lesser offense of sexual abuse.

This is the dynamic of many cases. In many states, murder is defined as an intentional killing without legal justification or excuse. When the judge thinks that the prosecution's proof suggests questions about the defendant's intent, the judge charges on lesser included offenses such as manslaughter (either reckless or intentional) or even criminal negligent manslaughter. Each lesser included offense has a different level of intent. If the prosecution cannot rule out reasonable doubt about the degree of intent required to convict for murder, the jury is to consider manslaughter. If the prosecution cannot rule out reasonable doubts about the state

of mind required for manslaughter, the jury could convict for criminal negligent homicide. And if the prosecution cannot rule out reasonable doubts about the requisite state of mind for criminal negligent homicide, it could acquit.

Without Rule Out, the jury may never get to any of the lesser included offenses and won't think about them while debating the main offense. With Rule Out, they may even consider them all at once—through the lens of intent.

Consider the following examples of actual cases tried recently.

A young defendant was charged with capital murder. He was a passenger in a parked car at a restaurant. The driver of that car—Driver A—parked at such an angle that it blocked the adjacent car from pulling out to leave. Driver A went into the restaurant to pick up food. While Driver A was in the restaurant, the driver of the hemmed-in car—Driver B—approached the defendant, who was still sitting in the passenger seat of Driver A's car. A verbal argument ensued. Frustrated, Driver B attacked the defendant-passenger. The defendant-passenger grabbed a gun and fired a fatal shot into Driver B's head.

The defense team conducted a *prove-innocence* case, trying to prove self-defense. So the jury debated between self-defense and guilt. They chose guilt. The judge sentenced the defendant to life with possibility of release. Because the jury was focused on choosing between self-defense and guilt, they never had to look carefully at reasonable doubts about intent—though they'd have avoided forcing the jurors to pick self-defense (acquittal) or guilt and focused them instead on requiring the prosecutor to rule out reasonable doubts as to a "particularized intent" to kill. Without carefully considering those reasonable doubts, it was easy to convict on the main charge instead of even looking at the lesser included offenses such as noncapital murder (which does not require proof of a "particularized intent"), manslaughter, or criminal negligent homicide.

Further, and importantly, the defense saw no reason to bring out the basis of a strong reasonable doubt: that the defendant had just taken a large quantity of prescribed Xanax and that he's bipolar. That raised the logical possibility of his being unable to formulate an intent to kill. Since the deceased was unarmed, self-defense was a good defense to use—but only as a way to rule out reasonable doubts about intent.

Recently I was exposed to a murder case involving a deadly car wreck. I expected the judge to charge the jury on the lesser included offenses of reckless manslaughter, criminal negligent homicide, and

even DUI, based on the facts and defenses. And she did. I had strongly advised the defense team to use the Rule-Out method, beginning with the defendant's state of mind at the time of the fatality. In addition I advised that Rule Out be used to raise doubts about the forensic toxicology regarding blood draws and extrapolations, impairment of the accused, speed, and especially the reliability of the EDR (the black box in most cars that records air bag deployments and speed upon impact) as well as doubts about the contributing cause of the wreck: an oncoming car without its blinker on turned directly in front of the accused just before the crash. These things are highly unlikely to prove innocence. But they were solid reasonable doubts.

The lawyer who delivered the closing argument made one of the most eloquent, powerful, and persuasive arguments imaginable. But she offered the jury a binary choice by arguing that the wreck's only cause was the oncoming car cutting in front of the defendant. So she put herself in the position of having to prove that argument. The lawyer, skilled as she was, did not use Rule Out. So jurors had no reason to think about the reasonable doubts about the driver's state of mind, the established flaw in the EDR, the methodology of the forensics, and factual evidence that either the defendant was not impaired or the alcohol he consumed did not contribute to the wreck. The eloquently delivered closing argument barely touched on burden of proof.

By law, the prosecution had to prove that the defendant possessed a state of mind evidencing an "extreme indifference to human life"; that's the intent this murder charge required. Rule Out would have focused jurors on the facts that raised the logical possibility that the defendant was *not* extremely indifferent to human life. But with the jurors focused entirely on the singular question of the causation of the wreck, they had no reason to meaningfully consider each lesser included offense. They quickly returned a verdict for murder.

Almost any crime in which intent must be proven—as in most serious felonies—contains one or more lesser included offenses. The intent of the accused in almost all white-collar crime is the issue and crux of the case. Fraud prosecutions revolve around the defendant's state of mind. Most federal offenses require the prosecution to prove the defendant knowingly and willfully intended to commit the charged crime. Were the financial payments intended to bribe? Could the prosecution rule out logical possibilities that suggest the payments were a gift consistent with a longtime relationship between the defendant and the person making

the payments, or did the fact that the payments were transparent, not concealed, raise reasonable doubts?

The difference between using and not using Rule Out is often the difference between getting to and not getting to lesser included defenses instead of getting knocked out with a guilty verdict on the main charge.

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1. Alabama defense attorney Richard S. Jaffe has successfully defended hundreds of white-collar and murder defendants, including 70 who faced the death penalty. (See more in bios section, p. 189.) He's long relied on the principles and methods that constitute Rule Out, especially the principle of winning through reasonable doubts. From the trenches he's written this overview of Rule Out's central tenet. It's followed by his critical guidance about lesser included offenses.

Chapter 5

The Art and Craft of Reasonable Doubts

Introduction

This chapter helps expand your universe of reasonable doubts and your skill at using them. Not every judge will accept every point that follows, but again, don't take no for an answer until you've tried to help the judge see what you should be allowed to do.

And again, don't worry for now how to teach jurors the points that follow. Just make sure you understand them. We'll get to their use later.

Proof beyond reasonable doubt was invented to protect the trier of fact, not the defendant. This can turn into a good story to tell jurors in closing to help emphasize their own need to follow the law. See the details on p. 80.

In some venues you can't mention the law. So with or without that limitation, you should fold the law into your direct and cross-exam questions. On cross, for example:

> Q: Ms. State's Expert, you know of no evidence, do you, that rules out reasonable doubt about whether the lab might have improperly done any protocol step? Even one?

This shows two things: that one wrong step creates reasonable doubt and that one reasonable doubt acquits. Why? Because that's what the jurors see you pursue. When throughout trial you continually go after "at least one" reasonable doubt about each of the state's various facts, jurors get the idea that you need only one to acquit. It becomes part of the rules of the game. (This need not stop you from showing more than just that one reasonable doubt.)

See the rest of forensics cross-examination starting on p. 135.

Focus groups give you a jury's-eye view of the case that will almost always be very different from yours, particularly with spotting and refining reasonable doubts that will resonate with actual jurors. Focus "groups" are as easy as just talking informally with various people unconnected with the law or the case. You can —should—also do somewhat more elaborate small groups, which you can do on your own for very little money (and sometimes free) and range all the way up to more comprehensive sessions that include multiple deliberation groups. Your law office can easily learn to do modest-sized sessions. When you have the resources, it's irresponsible to try a case (or even negotiate a plea) without thorough focus-group testing. See more in the section by Artemis Malekpour, p. 165.

The Characteristics of Reasonable Doubt

Don't try right now to memorize these characteristics or figure out how to convey each one to jurors. That's for later. A reasonable doubt acquits when it's about any individual fact the state must prove.

- **A reasonable doubt is a *doubt based on reason.***[1] ***Reason* means logic.** This has myriad consequences. The more you know about them, the more successfully you'll apply Rule Out within the particularity of your local rules, laws, jury instructions, judges, jury characteristics, strategy limitations, and other such factors.
- **Alternatives.** A reasonable doubt about a fact means there's at least one possible alternative to the fact, including that the fact simply might not exist or is just wrong.
- **Trials are a search for reasonable doubts**, not truth. When a prosecutor or judge or jury pamphlet or video (which you must always check for prejudicial statements or inferences) says that trial is a process to determine the truth, or who's right, object. A criminal trial is not a search for truth; it is *solely* a test of whether the state has enough evidence to convict beyond all reasonable doubts. Jurors who believe trial is a search for truth expect you to prove innocence. Move in limine to bar such messages from anyone. Move for a mistrial if violated or at least a curative instruction. (This is one of the few instances where a curative instruction can actually cure.) If denied, consider for appeal.

  Even when a jury instruction about truth seems hard to

fight, you (perhaps with help from your listservs, friends, etc.) can find a way. For example, the Wisconsin reasonable doubt instruction—affirmed by its supreme court, no less—tells jurors to *look for truth, not doubts*. Outrageous? You bet. You overcome this prosecution-friendly, burden-lowering instruction by pointing out to jurors that *the only way to know that something is true is by making sure the state has ruled out all the reasonable doubts about it*. And in voir dire: "Folks, in cases like this, truth is arrived at in only one way: either there *are* or *are not* any reasonable doubts about anything the state must prove." Then ask about it, using the some-people/other-people template described in the voir-dire section.

See more about bad jury instructions near the end of this section.

• **All or nothing.** No fact or facts budge the presumption of innocence unless every juror agrees that the state has proven *all* of its required facts beyond reasonable doubt.

"Almost" doesn't count.

• **Subjective decisions.** Jurors cannot be asked to make subjective decisions.[2] Subjectivity is not logical because it relies on emotion, biases, and other personal point-of-view characteristics. Guilty verdicts must be based on logic.

• **Logical inference of reasonable doubt.** When a doubt can be logically inferred from either the evidence or lack of evidence, the doubt is a reasonable doubt. This includes negative (adverse) inferences.

• **Abandoning reason. A reasonable doubt is anything that can be believed *without abandoning reason*.** If a juror can believe—without abandoning reason—that John might not have been in Boston, then it's a reasonable doubt. But believing that John might have been on Mars requires abandoning reason (at least as of this writing). This distinction, which you can use in closing, solidifies the jurors' understanding of reasonable doubts.

• **Conditionals.** Use conditionals, such as *might*, *maybe*, *could have*, *might have*, *possibly*, and so on. This is because *might have been* or *could have been* (in, say, "could have been in New York") can be negatively inferred from the lack of evidence that he was in Boston. But "John *was* in New York" cannot be inferred from lack of evidence. (See more in the next section on foundations for reasonable doubts.)

• **Consistency.** Consistency is necessary for proving something, not for showing reasonable doubts. All due

respect for those who demand a consistent defense theory, but in trial you want to show every possible way the government might be wrong about something they must prove, even when some of those ways are inconsistent with each other. Maybe John was not in Boston. Or maybe John was in Boston but at home instead of at the bar. Or maybe at the bar but maybe not the guy who did the crime. To prove one, you'd have to choose one and omit the rest, but you can use all three and more as reasonable doubts because all you need are possibilities (unless self-defense requires you to prove it, as in some states).

- ○ Self-defense: Think about a self-defense claim. Seemingly contradictory defenses could be that John was not there and it was self-defense. "You can't claim self-defense and claim he wasn't there!" Yes, you can: the killing *might* have been self-defense *on the part of whoever did it*—without contradicting the possibility that John might not have been there.

• **RD + RD = RD.** Two or more points in reasonable doubt do not logically remove the reasonable doubt about either point. Reasonable doubts about five witnesses' identification testimony don't combine into a beyond-reasonable-doubt ID. Think of reasonable doubt as an impurity. A mix of five ingredients each containing the same impurity does not create purity. Not logically. RD + RD = RD.

You'll encounter resistance to this logical truth. It *seems* logical to conclude that five eyewitnesses or three forensicists must be right. But though the odds that they're all wrong might diminish, they don't disappear. They don't logically place the conclusion beyond reasonable doubt. The only question is how much it can diminish—how small a reasonable doubt can be—before it no longer counts. And only jurors can make that call, because the size of a reasonable doubt is irrelevant. RD + RD = RD.

In everyday life, dozens, hundreds, even thousands of witnesses can all be wrong.

Example (for use in closing): Let's say I'm a Duke football fan watching Duke play its favorite rival, the University of North Carolina. I observe a UNC receiver step out of bounds as he catches the ball. As with most human observation, there's reasonable doubt about mine. But the Duke fan sitting next to me says he saw the same thing. He's also a human, so there's reasonable doubt about

what he thinks he saw. Do our combined observations rule out our reasonable doubt? Of course not. In this situation, they don't even make the reasonable doubt smaller. **RD + RD = RD.**

Nor does reasonable doubt that the guy behind me might be wrong in honestly claiming he too saw the UNC guy go of bounds. **RD + RD + RD = RD.**

This concept is a case winner because the state frequently hopes that the combined weight of all their reasonably doubtable facts sends those facts beyond reasonable doubt. This is neither logical nor does it match real-life experience, as you'll see in the rest of the football example later. At most, multiple reasonably doubtable witnesses (and all other reasonably doubtable things) might sometimes logically shrink the reasonable doubt, but size does not count, and any number of observers can all be wrong about the same thing. Often the possible error of each observer is for the same reason, such as the same flaw in how the photo lineups were conducted, or the fact that the several ID witnesses were focused mostly on the gun instead of the perp's face. Their attention was fixed on the gun due to *danger bias*, which automatically focuses people on immediate dangers. That focus means we pay less—if any—attention to anything else.

Cognitive Biases

One category of reasons many people can make the same observational or memory error is our cognitive biases, covered more fully later in this section. Humans have a wide range of biases—over 200, mostly unconscious, some inherent, some learned. They're poised to act instantly whenever appropriate. One of these can explain multiple-witness errors, as in the football example: team (tribal) bias.

When you are faced with multiple state's witnesses who all agree about something bad for your case, look for possible in-common biases or other single causes that could account for what they're in agreement about. For example, let's go back to football.

Team/tribal bias evolved in humans by necessity. So it's hard-wired into our genes. This bias is why not merely three but 15,000 Duke football fans can all be *honestly* wrong about the same thing: when 15,000 of us watch that damn UNC pass receiver catch the ball, speed down the sideline, and cross Duke's goal line, we are certain we saw him step out of bounds as he caught the ball, which should have ended the play. But UNC's 12,500 fans just as honestly believe they saw the UNC receiver make the catch *in* bounds. One

or the other group is obviously wrong. Each half honestly "knows" the other half is wrong.

The same thing happens every day in politics with even greater numbers of people. Neither side can understand how the other side could possibly believe what they do, so each can only conclude that the other side is either lying or crazy. The same thing happens on large and small scales in countless familiar contexts, including family quarrels, divorces, negotiations, and so forth. The number of people on a side—anywhere from two to many millions—who agree with each other is rarely related to which side is correct. An entire white population of a town or empire honestly claiming that people with dark skin are inferior is not a measure of truth.

It's no different in court. **RD + RD + RD = RD.** OK, maybe sometimes **RD + RD + RD** = rd. But the size, weight, and font of a reasonable doubt make no difference.

Use the football analogy or something similar in trial. And in voir dire ask how often the prospective jurors have seen two or more people all be wrong about the same thing they were all certain of. You want jurors who can imagine it happening in trial because they've seen it in their everyday lives. And you want examples to come from the prospective jurors.

As with most Rule Out, you won't have to explain this concept. The football or similar analogy and the voir-dire question demonstrate it.

Result: No matter how many witnesses think they saw the same thing, *all* testimony that depends on observation, memory, objectivity, accuracy of reporting, or honesty comes with reasonable doubt *until something that is not in reasonable doubt rules it out*. If you think I'm saying there's reasonable doubt about all testimony, you're right. More on this later.

Subfact Reasonable Doubts

Subfact Reasonable Doubts are among Rule Out's most useful techniques. A subfact is any fact required to support the truth of any larger main fact. For the state to prove a main fact such as John's presence during the crime, the state might have to prove beyond reasonable doubt such subfacts as the blood at the scene having been John's, the eyewitness's time estimate of John's presence being accurate, the eyewitness identification of John being accurate, and so on. Again: a subfact is anything that must be true beyond reasonable doubt in order for the main fact to be true.

Subsubfacts. Let's say that for the state to prove subfact 1—that

the blood was John's—the state must prove that the DNA at the scene was his. One subsubfact (of many) the state must prove beyond reasonable doubt is that there was no DNA cross-contamination in the lab that identified the DNA in the blood as John's.

Main fact: John = perp.
Subfact: John was at the scene.
Subsubfact: It's John's DNA.
Subsubsubfact: No cross-contamination in the lab.

And so on.

Of course this is obvious without all this subfact-analysis rigamarole. But in trial, where things get more complex, subfact analysis shows you reasonable doubts you'd miss without it. It's also a clear and persuasive way to show jurors how *even one small seemingly unrelated doubt climbs the ladder to create reasonable doubt about guilt*. This is how a tiny design detail on a drawing board (a subsubsubsubsubfact) went up the ladder a step at a time until the main fact: it killed the *Challenger* space shuttle's seven astronauts.

Subfact analysis helps you find otherwise meaningless subsubsubsub-facts—such as a faulty or overused or unchanged air filter that goes up the ladder to create reasonable doubt about a defendant's guilt. In this way you can create reasonable doubt even about the supposed infallibility of DNA testing.

Normally you might never have thought about the condition of the air filters in a lab. They're a pointless concern for proving innocence. Even when using Rule Out and just trying to show reasonable doubts, you'd likely never have thought about it. But a subfact analysis gets it to leap out and smack you on the nose.

If you're not quite clear about subfact analysis, this analogy will help. Subfacts are like car parts necessary for a car to run. Gas is one such subfact. No gas, no run. Electricity is a subfact (or a subsubfact, actually): no electricity = no fuel ignition = no run. Transmission, differential, axles, and wheels are subfacts necessary for a car to run. They are all individually necessary preconditions for the car to run. When even one is absent, the car won't run. So logically, reasonable doubt about any such subfact or subsubfact creates reasonable doubt about whether the car will run.

How Do You Find All Those Subfacts?

You simply think backward. For the car to run, what subfacts must there be? Functioning engine, gas, wheels, and so on. OK, now

what's necessary for each of those subfacts to function? Well, the gas, for example, must be ignited. That in turn requires many subsubfacts:

Spark plugs must work. This requires subsubsubfacts:
Spark plugs must be correctly seated in place
Spark plugs must be set to proper spark gap
Spark plugs must get proper electrical input
Requires that battery not be empty
Requires intact wiring to spark plug
Requires spark plug to ignite at proper time
Requires proper calibration of engine sensor
And so on.

This is just a partial subfact list. The whole thing would include many more necessary sub, subsub, subsubsub, etc., paths—dozens of necessary preconditions for the car to run. On your own or with an expert's help, subfact analysis will identify all of them—everything that must be "true" for the car to run.

Subfact Paths

You'll do the same with the state's primary facts. Each is likely to have subfact paths. For a state's main fact to be true beyond reasonable doubt, the state must prove *everything* in the subfact paths to be true beyond reasonable doubt. In other words, the state must rule out every reasonable doubt along the way.

Often, you'll find things that don't have to be true for a conviction because some other subfact that *is* true takes care of it. For example, reasonable doubt about a state ID eyewitness's testimony won't acquit if the state has other evidence that makes the identification beyond reasonable doubt, such as an unambiguous video.[3] You must analyze every path attached to each main fact by which the state could get to beyond reasonable doubt and show a reasonable doubt in each one.

Let's get back to that air filter. And again, let's say that to convict, the state must prove that John was on the scene. No video, two frightened eyewitnesses, dead victim, so we need only one subset analysis: that of the DNA found on the scene. (1) Is it John's? (2) Was it deposited by the perp (3) at the time? There'd be a path for each one of those for you to follow up. To illustrate the process—and get to the air filter—let's examine the first.

Among the subfacts necessary to prove that the DNA is John's is

that there was no cross-contamination between the DNA found at the scene and the sample DNA taken from John. Analyze backward, specifying every subsubfact necessary to rule out cross-contamination. They can include:

1. Proper storage separation of the samples.
2. Use of sterilized equipment for handling both DNA samples.
3. Use of intact storage containers (loose or damaged containers allow for cross-contamination).
4. Prevention of aerosols (which are spread while testing the crime-scene DNA) from settling later onto the sample from John as it's being tested.
5. Proper hand cleaning by lab technicians before moving between samples to prevent inadvertent mingling.

All five subsubfacts will have their own paths to trace. Let's look at #4.

What does it take to make sure #4—prevention of cross-contamination via aerosol—is properly executed and reliably accomplished? It can be one of several measures. Determine which one the lab used. If they won't tell you, there's a reasonable doubt about whether it was done, so there's no way the state can rule out possible cross-contamination. But normally the lab will tell you whether they tested in rooms with separate air-exchange systems, or in separate buildings, or after the maximum period necessary for any aerosol to settle, or that no sample was ever exposed to the ambient air, or—most common—that the air in the room was properly purified of aerosols after testing the first sample.

Let's say the lab claims they solved the aerosol problem by means of air purification.

What does reliable air purification require? Among other things:

1. A correct air filter in the room's air-exchange system.
2. Filter was cleaned or replaced before testing each sample.
3. Filter was properly seated in place.
4. Air system was properly designed.
5. Air system was properly checked and maintained.
6. *All* the air in the room had to pass through the filter system.
7. Sufficient time passed between testing each sample for air to be fully purified by the system.
8. And so on.

Are we getting too picky? No. No more than the space shuttle *Challenger*'s O-rings. The state claims that the DNA is John's beyond reasonable doubt. *Anything* that can create reasonable doubt about that claim is enough to acquit. For example, look at subsubfact 2: if there's reasonable doubt about whether the air filter was clean before the lab tested the second sample, there's reasonable doubt about whether there was cross-contamination, and there's thus reasonable doubt about whether John was at the scene and thus reasonable doubt about guilt—*unless* the state has another way to prove beyond reasonable doubt that the air was purified. (When there is another way, simply analyze it separately.)

Just one reasonable doubt about any necessary piece of lab air-filter routine maintenance and your client walks. And there are many such possibilities—even, as you see, with the Godzilla of forensics: DNA.

Logic: Note that this method relies on the fact that jurors are required to base their convictions on logic.

To review:

Main fact state must prove rests on
Subfacts such as perp ID, which rests on
Subsubfacts such as DNA at the scene, which rests on
Necessary steps to reliable DNA testing, which rests on
Individual requirements for executing each step,
And so on.

Moral: for want of a nail, the kingdom (the state's case) is lost. So get out of the habit of waiting for reasonable doubts to jump out at you. Dig in and find them for yourself. They hide.

Whole-Case Decision-Making

Most jurors think their job is to passively observe trial and at the end make a final judgment based on their overall impressions of the case. This blurs the details and takes attention off the specific reasonable doubts.

As a result, in whole-case decision-making:

- Jurors rarely mention reasonable doubts in deliberations. But Rule Out's detailed and incessant hunt for and focus on specific, point-by-point reasonable doubts (instead of whole-case impression) makes them the main topic in deliberations.

• Whole-case decision-making leads juries to debate guilt versus innocence, which is an irrelevant question. Yet it has traditionally been the only question jurors discuss in deliberations.

• Jurors apply an improperly subjective application of law; this opens the door to the biases and speculations that subjectivity entails.

• Jurors apply improper criteria such as "Does the state's case outweigh the defense's?" or "Which way am I leaning?" Or, as jurors sometimes say, "We were absolutely sure beyond reasonable doubt that the state had the stronger case." Whoo.

Whole-case decision-making is a leading cause of convictions. Rule Out prevents whole-case decision-making. Don't say anything to undermine this.

The Subtheme of Logic

Make logic a subtheme of your case (your main theme is always reasonable doubt). Reasonable doubts are mainly logic driven, unlike many beliefs in guilt. You can make logic a subtheme simply by frequent use of the word *logic* in connection with reasonable doubt. And in voir dire and closing, cover logic as the necessary basis for verdicts.

Due process requires logic and objectivity in order to convict a criminal defendant.

Reasonable Doubt

A single reasonable doubt acquits. In voir dire: "In cases like this, even one reasonable doubt acquits when it's a reasonable doubt about any fact the state must prove. Some folks think that . . . ." (see the full question in the voir-dire section).

Jurors need not believe a reasonable doubt is true. That's why it's called a *doubt*. Many jurors don't know this. But they will when you use words such as *might* or *maybe* or *could have*, such as in "John *might* not have been in Boston." Traditionally, most defense attorneys think about only those reasonable doubts that jurors can be persuaded are true. When you expand your standard to include those that jurors will accept as merely possible, the trickle of reasonable doubts can become a torrent.

Evidence the Jurors Believe

A reasonable doubt is anything the jurors can negatively infer from the evidence *they believe*. You'll show this principle by referring not merely to "the evidence" but to "the evidence you believe" when speaking of evidence that allows reasonable doubt. ("When, for all you can tell from the evidence you believe, it's logically possible that John might not have been in Boston, then . . . .")

Foundations Necessary for Reasonable Doubts?

A reasonable doubt is any alternative to something the government must prove that can be logically inferred from the evidence. Some judges (and some state laws) resist this; they want foundations for alternatives, not just inferences. See p. 84 for how to handle this other than just the ways suggested next.

When the state claims John was in Boston, you can properly make a negative (adverse) inference from the same evidence that maybe John was not in Boston. You need no additional evidence for this. But many judges bar anything more specific, such as the possible alternative that John could have been in St. Louis, unless you have a specific basis for naming St. Louis.

Similarly, while you can negatively infer "John might not be the one who committed the crime," you might encounter resistance if you say "For all we can tell by the evidence, it could have been Sam or Zekial or the bartender" unless you have a basis for naming them.

And there's a gray area: "It could have been someone else" versus "It could have been someone else *in the city*" versus "It could have been someone else *in the building*" versus "It could have been someone else *in the room*" versus "It could have been someone else *sitting at the same table*" versus "It could have been Brittanie." Somewhere along the way, you can encounter the court's resistance.

The easy solution is simply to avoid specific alternatives for which you have no evidence: settle for "might not have been in Boston" instead of "might have been in New Orleans." But we much prefer concrete, visual alternatives, each of which is worth a thousand verbal abstractions.

Judicial Resistance

To go beyond the easy solution, use this approach (here come some weeds): judicial resistance to your inferences of specific alternatives ("could have been in *New York*") is based on preventing speculation.

As such, it's legitimate resistance. But there's nothing speculative about the totality of this next sentence because it's in itself a fact: "*It's possible* John was not in Boston but in New York." There is nothing speculative about that sentence's meaning; in the absence of evidence that rules out New York, the sentence is undeniably true to a logical certainty, as certain as 2 + 2 = 4. By definition of the word *speculative*, nothing undeniably and logically true can be called speculative. So "It's possible we'll get rain on this date in five years" is an actual true fact, not a speculation, as long as you include "it's possible."

That's one possible solution to a judge's resistance to allowing you to mention specific alternatives with no basis. With or without it, use the following easier way.

Cross-Exam

In cross-examination, ask whether the witness knows of any evidence that rules out the possibility of each alternative you want to mention. Use the Dodd question (p. 129): "You know of no evidence that rules out the possibility John might have been in New York?" Regardless of the answer, New York is now in evidence because all testimony is evidence.

This should eliminate the judge's resistance and—significantly—create and maintain concrete mental images of reasonable doubts throughout the state's case-in-chief. With zero speculation.

Size/Weight of a Reasonable Doubt

The law does not specify a necessary minimum size or weight in order for a reasonable doubt to acquit. In fact, many courts have discouraged any quantification of a reasonable doubt's size or weight. That's why the state cannot properly say that beyond reasonable doubt means being 99 percent sure. Depending where you are, a judge who attaches a number can be courting reversal. *A reasonable doubt has no dimension. It is binary: it exists or it does not exist*, just like a light switch (without a dimmer) is either on or off. So no matter how small a reasonable doubt is, jurors can decide to apply it to their decision-making. You'll have voir-dire questions about this (p. 100), including about the powerful Tylenol analogy for voir dire, which you should also use in closing.

Not Enough Evidence

This specifically means there's not enough evidence to prove a particular fact beyond reasonable doubt. Don't say "insufficient evidence"; "not enough evidence" is the juror-friendly phrase.

Using the phrase often enough to make it familiar to jurors has several important benefits:

- It creates an excellent subtheme for trial because it unifies our case even though we have no single theory of the case. Use it liberally, such as in "The prosecution does not have *enough evidence* to rule out reasonable doubt about X."
- The term provides jurors with a comfortable and easy way after trial to explain to friends and family why they acquitted. "There was just not enough evidence."
- It gets the jurors off the hook in deliberations by giving them a legitimate way out of being forced to argue endlessly to get to unanimity. Reporting to the judge that there's not enough evidence is more likely to end deliberations than just telling the judge they have not been able to decide. While this does not lead to acquittal, at least it blocks conviction.
- It arms your favorable jurors with a term they'll comfortably use to fight for you, and they'll cling to it in order to hold their ground.
- *Not enough evidence* is a difficult concept for hostile jurors to argue against in deliberations.

In closing: "If someone wants to convict, ask them to show you that there's *enough evidence* to rule out each reasonable doubt that you have." This directs the effect of Rule Out onto the hostile jurors.

Because *not enough evidence* carries so many benefits, connect it to each individual reasonable doubt. "There's not enough evidence to rule out the possible alternatives to where John was."

Other uses:

In opening: "The state does not have enough evidence to prove guilt."

On cross: "You don't know of enough evidence to logically rule out the possibility that John might not have been in Boston?"

In closing: Attach the phrase to every reasonable doubt, as in "There's not enough evidence to rule it out." Also: "During deliberations, if someone thinks John was in Boston, remind them there's not enough evidence to rule out the possibility he might have been elsewhere."

The words *not enough evidence* should toll like a bell throughout trial.

Unknowns

"Not enough evidence" results in unknowns; an unknown means there's not enough evidence. For example, a surveillance-video timestamp shows the defendant leaving the scene right after the crime. But if the videocam's clock had not been connected to the internet or recently set, there's not enough evidence to know the time—so time becomes an unknown. So whenever you can, couple "not enough evidence" with "unknown."

"Unknown" is a useful proxy for reasonable doubt. "The state assumes *but no one knows* where John was." "The radar gun says 65 but *no one knows* how fast the car was changing speed." (Radar guns can't gauge speed while speed is changing at a greater rate than the detector's Doppler adjustment system can adjust for.) "*No one knows* how the drugs got into the trunk."

Trade-secret unknowns: When, say, a radar detector uses trade-secret software, how it works is an unknown. Ditto trade-secret DNA software. A judge might be justified in refusing to open the trade-secret software but should not tell the jurors to set aside. Trade secrets might be protected, but they do not somehow lower the state's criminal burden.

Logically, no decision that depends on anything unknown can be made beyond reasonable doubt.

Time Spent

Focus the jurors continually on reasonable doubts. *To jurors, trial is about whatever it spends its time being about*. The more you talk about reasonable doubt, not enough evidence, and other such topics, the more that jurors incorporate them into their verdict. People almost always decide based on whatever is most on their minds while they're in the process of deciding.

Materiality

A caution: A reasonable doubt must be material to a verdict question. When jurors think you're saying that a nonmaterial doubt is a reasonable doubt, they question whether reasonable doubts should really control the verdict.

The Reasonable Doubt Triangle

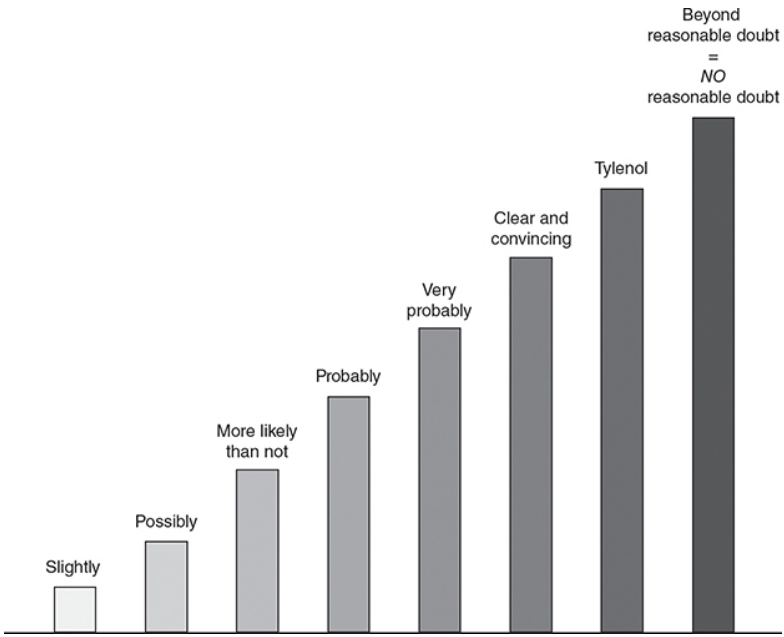
Based on the strongest geometric shape as well as the visually clearest and most impactful shape, the reasonable-doubt triangle

helps jurors visualize the state's burden of proof. You can use this in voir dire and opening, when allowed—and always in closing.

The one that follows is just a prototype you can use as is or change according to your own preferences. But don't change its clear visual emphasis of burden.

Reasonable Doubt Triangle

How sure must you be to convict?



The Dominoes Demonstration

At this point, you should watch the dominoes video before reading further. Stream it at https://www.malekpourball.com/. It persuasively shows jurors why they cannot convict and arms them to fight off and stand firm against conviction. You'll use it in closing.

Defense Narrative v. Defense Narratives

A defense narrative is a story that shows your client's innocence. Some leading icons of the defense bar have long taught its use. But a narrative too often leads to conviction. There are several reasons for this. First, many lawyers aren't good storytellers. More importantly, regardless of how well told, *a narrative is an assertion of*

innocence, which you must avoid.

But you can use narrativeS. Plural. Never use just one. If you tell any, *tell three*, all of which contradict each other. Explain that the state's case is so loose that any of the three is logically possible.

Start your first defense story with "Let me tell you a story based on the evidence."

Then tell a second that conflicts with the first: "Here's a *different* story based on the same evidence."

Then, "Here's a third . . . ." and so forth.

Then, "The prosecutor cannot rule out any of these stories, and there are probably more you'll think of. That means any one of them is possibly true, for all anyone knows."

"*But don't I need a consistent theory of the case?*" No, you do not. The state needs consistency. We don't.

"Unverified"

You might want to add a juror-friendly label for each point the defense cannot rid of reasonable doubt: the label *can* become a reasonable-doubt red flag in trial, and jurors will use the word *unverified* in deliberations. This points the discussion where you want it and arms your favorable jurors to fight for you and stand firm.

Low-Hanging Fruit

Offer as many different reasonable doubts as you can come up with, but focus on those that are the most substantial, and focus on the charge elements most vulnerable to reasonable doubts, as *intent* often is. While it can be impossible to prove the defendant did not form intent, it's much easier to show reasonable doubt about it; in that circumstance, it's low-hanging fruit.

Setting the Stage

At your first opportunity in trial—such as your first words in voir dire—set the stage for Rule Out. Dispose of the jurors' incoming belief that you're there to prove the defendant innocent. Do this up front; when you don't introduce your reasonable doubt framework until late in your opening, it can seem lame and even a near-concession of guilt.

So, for example, start voir dire with this:

Good morning. How many of you are surprised when I say that I'm not here to prove John is innocent? Ms. Smith? You look like that surprises you. Please tell me about that.

"Poisoning"?

Don't worry about a prospective juror's response to a voir-dire question "poisoning" other jurors. It almost never happens. Even if it did, you need the bad news now, not after trial when interviewing jurors to see why they convicted.

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1. For example, Hopft v. Utah, 120 U.S. 430 (1887).

2. See p. 77.

3. Note, however, that the advent of artificial intelligence signals the end of reliable videos or photos. Any bright high-school kid can (or soon can) undetectably fabricate almost anything on video or in photos. This will create new problems and new reasonable doubts.

Chapter 6

Forensics and Junk Science

The Garden of Reasonable Doubts[1]

Forensicists who don't strictly adhere to the established standards are alchemists, not scientists. (When you have your own expert, let them read this section so they know what you need.)

This section applies to forensics and related topics such as lineups, confessions, false confessions, and anything else requiring process or protocol. As you're about to see—and as many scientists and other authorities have long concluded—the courtroom is too often the place where science goes to die. This is because forensics is inherently vulnerable to reasonable doubts. Yes, even DNA.

This section introduces methods of foraging for, gathering, and using those reasonable doubts. While some of these methods can help you argue against the admission of expert opinions, they're intended here to show jurors how those opinions are riddled with reasonable doubts.

The responsible criminal defense attorney must know—and stay current—about the developing science concerning problems with forensics. This section gets you started. It's only the first few weeks of Forensics 101 but gets you out from under the thumb of forensics.

The faults in forensics lie with methodologies, the researchers who support and validate the methodologies, and the people who apply the methodologies.

Claims about a methodology's accuracy are exaggerated by "researchers" whose selfish interests motivate them to advance, not critique, their particular approach. So, for example, when researching a methodology's reliability, they sometimes count inconclusive results with accurate results, creating artificially high

reliability estimates.[2] These and similar frauds on the jury can be hard to spot.

You must be wary even about the protocols that labs use. Economy, speed, and the desire to please the state motivate labs and their staffs to create shortcuts or outcome-biasing protocols and conceal sloppy execution of their required protocols. Labs are, after all, money-based operations.

Nor should you automatically trust the quality or honesty of a lab's personnel. The best tend to leave for greener pastures. And many who are honest can be prey to biases including those they don't know they have.

Some forensic methods cannot even claim to be science, though they do. So far, these include bitemark analysis, hair analysis, bullet markings, and anything else requiring significant subjective judgment, such as most fingerprint matching.

And there's more. Forensics often passes off the mere use of scientific techniques as actually doing science. But making meth uses scientific techniques, as does making dinner, but neither is science. "We calculated the flour, accounted for the gravy's specific gravity, attenuated vinegar pH by 0.05 percent, and regulated temperature at a constant 160 degrees plus or minus 1.5 degrees" uses scientific techniques and terms, but it ain't science. Astrology is not science, nor is alchemy, though both use scientific techniques.

A common problem is that defense attorneys too easily believe the state's forensics or that there's no way to get jurors to disbelieve them. Avoid these traps. With Rule Out, you need not prove the state's forensics are wrong. Reasonable doubt is all you need—which, as you'll see next, you'll most often find.

Error Rate

Let's start with error rate. We'll look at DNA's error rate, because DNA has the lowest apparent error rate of all forensics. But *error rate* is actually forensics' dirty little secret—one that's used to misleadingly claim high accuracy. Error rate tells us how often a method is wrong. It's not speculative but based on verified past results. A forensic methodology known to be wrong once every hundred times has a 1 percent error rate; eight errors out of every hundred times is an 8 percent error rate; one error every hundred thousand times is 0.001 percent; and so on. But remember, this is solely about the error rate of the methodology in itself. It ignores the primary source of reasonable doubt: human error in executing the methodology, as explained next.

Zero Error Rate?

No forensics method—no science-based method of any kind—can have a zero error rate. Technically, that means there's reasonable doubt about the results of every forensic method. Only the jurors can decide when an error rate might be too low to use as a basis for reasonable doubt.

No Known Error Rate?

A method with no known error rate—or an expert who does not provide the error rate—is useless for jurors, because without knowing the error rate, jurors cannot determine whether or how much to trust the results. That allows for considerable reasonable doubt.

Some error rates are unknown because no one has done the necessary research to make a determination. For example, the error rate of fingerprint matching is unknown because no one has been able to determine how many people have the same fingerprints. Thus, the frequency of identical prints is unknown—which in turn means there's no way to know how often fingerprint matching is wrong. Further, the century-old myth that no two people have identical prints is demonstrably false. For these and other reasons, fingerprint matching cannot be beyond-reasonable-doubt accurate. (Despite the lack of a scientific basis for fingerprint matching, the courts admit it mainly because it's been allowed for so long.[3] Well, they dunked witches for just as long. But our concern here is with reasonable doubt, not admissibility.)

Error rates are determined by statistical analysis of large numbers of the method's verified past accuracy results under strictly controlled conditions. Always demand to know how the error rate was arrived at and by whom. Have it examined by an expert even if they're not going to testify in trial. (You can use the information on cross.) This is important because some error rates have been determined by questionable means by researchers with conflicting interests.

When a lab can't or won't provide the full basis for its claimed error rate, the state cannot rule out reasonable doubts about the error rate's accuracy. (Once you ask about these points on cross, you can offer them as reasonable doubts regardless of the answers you get, because witness credibility is up to jurors.)

DNA

What about the current reigning monarch of forensic methods: DNA? How easily does that crown rest? Not very. DNA's miniscule error rate is grotesquely misleading because—as with all error rates given by forensicists—it factors out human error, which is the main source of forensic error.

Factoring out human error makes the methodology's error rate irrelevant because it does not help jurors determine how much to trust the forensicist's conclusions. Error rate remains irrelevant until the state proves beyond reasonable doubt that *every step* of the method's protocol has been properly executed—that is, that there's no logical possibility of any human error that can have affected the results. You'll see how to get there and take the jurors with you.

When the state cannot prove beyond reasonable doubt that the methodology was executed without material human error, the *actual* error rate is obviously unknown. So no one can tell whether the forensicist's opinion is accurate. That's a reasonable doubt the state cannot rule out.

So for example: when a state's forensic witness claims the error rate of their DNA-matching method is only one in a million—or 0.0001 percent, meaning wrong once every million times—that rate is accurate only when the witness can prove beyond reasonable doubt that all the police and the lab personnel properly executed *every* step of the process (including evidence collection) in exactly the same way and under exactly the same conditions as did the research that determined the methodology's error rate to begin with.

Let's say a DNA method's error rate is 0.0001 percent. This error rate assumes, among other things, zero possibility of cross-contamination from crime-scene specimen to the sample from the accused. There are many possible causes of cross-contamination. The expert cannot usually claim to know that all such possible causes have been excluded. So the expert who knows the lab's venting system was running is unlikely to be able to verify that its filters were sterile, properly in place from start to finish of testing, unadulterated, properly manufactured and protected against flaws, and other factors. Reasonable doubt about even one of these points creates the reasonable possibility that the lab's air currents transferred DNA molecules from the specimen to the sample from the accused. This makes the specimen and the sample seem to match when they do not.

And air currents are just one of several causes of cross-contamination.

When you ask the Dodd cross-exam question (p. 129), such as

"You know of no evidence that rules out the possibility that your lab's air exchange system could have malfunctioned?", the expert won't know of any such evidence. This creates reasonable doubt. The expert can avoid reasonable doubt only by proving beyond reasonable doubt that *everything* involved in proper air exchange in the room was as it should be: clean filters properly installed, verifiably proper design of the filtering system, air intake duct freshly cleaned, no blockage of or possible backup in exhaust ducts, no potentially confounding conditions such as a door opening or outside gust of wind against the exhaust vent that created air movement in the room, and so on.

You need to know every detail involved in the whole process from precollection through the end of testing. You can ask about each one individually: how does the state rule out possible missteps?

Bonus: Jurors easily understand this even without understanding a thing about the science involved.

Human Error

Human error crops up at every point from crime-scene protection through storage, preparation, equipment alignment, supply quality, testing, and analysis. Each error—each merely possible error—creates its own reasonable doubt about the forensicist's conclusion. The forensic expert rarely mentions this or admits how common human error is and how little they know about it in this particular case. Human error, even in the best of labs, is difficult to rule out when you dig deep enough.

This approach takes some work, but it stops the long record of convictions based on everything from *very probably right* forensics all the way down to garbage forensics.

On a darker level: It takes very few people bent on convicting your client to create false evidence. Even one lab technician or evidence gatherer can fraudulently get people convicted—as many have actually done. This has forced some states to retry hundreds of convicts. For all anyone knows, those known examples are just the tip of the iceberg. But once you show that there's any possible error in the execution of any forensics method, it's a fair inference that there were others—so the state must prove beyond reasonable doubt that there were none.

One more example of the smorgasbord of human failure in forensics: the failure to assure that devices and supplies are as they should be. For example, failure to align equipment (DNA devices,

speed radar, etc.) makes error possible even when the equipment has been aligned as frequently as the manufacturer recommends. Cars can break down before their next scheduled maintenance check, and lab equipment can do the same. So, for example, the only way to know beyond reasonable doubt that a DNA device is accurate is to test a known DNA sample alongside the unknown sample. Without that or some equivalent, there is always reasonable doubt about proper alignment. Commercial passenger plane pilots must check to be sure that everything on the plane is safe and working properly each time the plane is used. Forensic reliability requires no less.

How to Do It: The Template

Raising reasonable doubts about proper execution of the state's forensics uses a simple template:

1. The required step or condition. (Swabs must be sterile.)
2. Why required? (Contamination makes the result unreliable.)
3. Witness cannot rule out the possibility that the requirement was missed.

Note that the template works with forensics and other investigatory methods such as photo and in-person lineups, suspect interrogations, and anything else with required steps, considerations, and conditions. For example, lineups require arrays of roughly similar people, not, say, five short people with only one as tall as the person the witness reported seeing.

Proper Execution

The rules of evidence and science require that expert opinions be based on a scientifically accepted methodology *as properly executed*. "Proper execution" means meeting each necessary step and condition of the methodology. So look for the state's inability to rule out

1. *Incomplete* execution of a step
2. *Incorrect* execution of a step
3. *Omitted* but required considerations within each step

For a science-based conclusion to be reliable, the state must

prove beyond reasonable doubt that each step (such as "spin for ten seconds") and condition (such as 85 degrees) was properly fulfilled. Otherwise the investigator must explain in logical terms the harm the misstep, had it occurred, could have caused to the conclusion's reliability.

Basic science, basic logic, basic presumption of innocence, and basic burden of proof demand that when forensics and the prosecution hold hands, the forensics must be demonstrably correct beyond reasonable doubt.

Once you know which forensic disciplines (DNA, fingerprint matching, blood spatter, ballistics, tea leaves, etc.) the state will use, find out (1) whether it's a verified science, (2) its required steps and conditions, and (3) how each unfulfilled step and condition affects reliability. These are the ingredients of your expert's testimony and your cross-exam of the state's expert.

The first widely known pioneer in undermining DNA analysis in court is Barry Scheck. In the O.J. Simpson murder trial, Scheck showed—clearly enough for jurors to understand—how some required steps and conditions had not been met, resulting in cross-contamination. With all the drama and circus of that case, Scheck's work gets too little credit. But without him, those jurors may well have been faced with incontrovertible "proof" of Simpson's guilt. So along with Scheck's subsequent heroic and groundbreaking Innocence Project work, he demonstrated how to deprive the state of a DNA free pass to convict.

More forensic sources of possible error follow.

Subjective Judgments

Mentioned earlier, subjective judgments creep into some forensic methods despite the inevitability of reasonable doubts about *every* subjective decision. Bullet matching, for example, is based on subjective judgment, which is why the same examiner can come to different conclusions at different times of the same day about the same bullets. The same is true with traditional fingerprint matching.

Protocol Validity

Forensic labs and sometimes the state usually have protocols for executing forensics methods: checklists detailing every necessary step and condition. The lab, the state, and police usually have protocols for forensic evidence collection and specimen transportation and storage. Have an expert (whether or not they'll

testify) review the protocols for inaccuracies and omissions that can create reasonable doubts. Be alert for missing steps—such as checking procedures for assuring that supplies such as collection bags and tools are within their expiration dates and verifiably free of contamination. Outdated or contaminated supplies can invalidate the expert's courtroom opinion or at least cast it into reasonable doubt. When a protocol allows a lab to trust the manufacturer's purity or date label, the state should not win on the basis of that trust unless you get the opportunity to cross-examine the manufacturers.

A protocol's steps are like the items on an airplane pilot's checklists, such as for takeoffs, landings, water landings, engine failure, and so on. Same thing for surgeons. Even a single missed or improperly fulfilled checklist step can crash the plane, kill the patient, or turn the forensic opinion into a reasonable doubt.

No Protocol

It's not common, but when a lab has no written protocol, they have no way to check that the work was done completely and correctly—that is, reliably.

Further, without a protocol they can rely on, jurors cannot evaluate the lab's conclusions.

Whether or not there's a protocol, don't ignore your common sense. *Anything* that can undermine reliability creates a reasonable doubt, even when no one specifically requires or mentions it.

Staff Competence and Honesty

The state must prove beyond reasonable doubt that each individual involved—from evidence collection through final opinion—whose work could possibly affect reliability did their work honestly, properly, and completely. Courts often allow the testifying expert to rely on the work of others, but nothing should require the jury to trust that expert's reliance on those others.

Caveat: Before your own experts and investigators start work, make sure they understand that you're looking for reasonable doubts, not just flaws great enough to prove the opinion is wrong, and exactly what you (we) mean by reasonable doubt. Because experts and investigators are accustomed to looking only for flaws that show the opinion is wrong, they easily miss less weighty reasonable doubts. So guide them into becoming reasonable-doubt sleuths who spot and report on reasonable doubts without regard to

size or weight.

Self-Determined Error Rates

Be wary when an expert claims to have determined an error rate on their own, especially when they've relied solely on their training and experience and not statistical analysis of sufficiently large numbers of verified known results. A self-determined error rate by a lab or forensicist hired by the state is a conflict of interest.

OK, after all that, how about some relevant diversion? Let me tell you the true story of the Phantom of Heilbroon. As you read, follow the DNA.

The Phantom of Heilbroon

Once upon a time—May 1993 in Idar-Oberstein, Germany. Someone breaks into a 62-year-old woman's home, murders her, and disappears. Police collect DNA at the scene. No one matching that DNA is found.

Eight years later. March 2001. 185 miles away in Frieburg, Germany. Another murder. Again, police collect DNA at the scene. A different lab tests and determines it's the **same DNA**. Still, no one with that DNA is found.

Six months later. 225 miles north. Gerolstien, Germany. A heroin syringe is found in the woods. DNA on the syringe, tested by a third lab, is the **same DNA** as the first two. Police find no one who matches it.

A few nights later. 105 miles east. Budenheim, Germany. DNA specimens from cookie crumbs found at a break-in scene are tested by yet another lab. It's the **same DNA**. Still, no one with that DNA is found.

Three years later. 300 miles away, across the border in Arbois, France. Someone robs a gemstone dealer. A different lab determines it's the **same DNA** as the others. The French police find no one with that DNA.

A few months later. May 2005. Worms, back in Germany. The **same DNA** is found after a fight between two brothers. According to yet another lab, the DNA is not the brothers' but the Phantom's.

Seventeen months later. 80 miles away in Sasarbruken, Germany. Home break-in. **Same DNA**. Different lab. No match.

Five months later, 80 miles away in Gallneukirchen, Upper Austria. Yet another lab tests DNA after an optometrist's store burglary. It's the **same DNA** and they still find no match.

Between 2003 and 2007, DNA is found at 20 burglaries and vehicle thefts throughout Hesse, Baden-Württemberg, and Saarland, Germany; Tyrol, Austria; and Upper Austria. The 20 specimens each have the **same DNA**, each one determined by a different lab. No match is found.

January 2008; Heppenheim, Germany. DNA on a car carrying three murdered Georgians. A different lab says it's the **same DNA**.

March 2008 burglary. DNA sent to a different lab. Results: **same DNA**.

Same DNA again in an unused swimming pool in Niederstetten, Germany.

After finding the same DNA at 40 crime scenes, tested by almost 40 different labs, authorities post a €300,000 reward for the criminal, to no avail.

The end.

That's the true part of the story. Now pretend the cops catch the person matching all 40 DNA specimens. The state levies murder and other charges. You're the defense. The state offers no deal because the state is Germany, which has no deals.

You and everyone else know that the odds are billions to one that the DNA testing was wrong all 40 times. How do you defend your client?

The How Question

Use backward engineering: start with the outcome and ask yourself, "*How* could over three dozen labs be wrong in the same way?" I'm tempted to tell you, but you've already read enough of this book to figure it out yourself.

Short-Circuited Forensics

Certain common and seemingly harmless practices short-circuit the forensic process. For example, investigators and analysts often know or have the grounds to make a good guess at which result the state would prefer. This makes their results unreliable, because we have no way to determine whether it might have elicited conscious or unconscious biases that might have distorted their work. This means that for the results to be reliable, the state must not even hint at the results they prefer, such as by saying, "Is this John Smith's blood?" instead of "Whose blood is this?"

Similarly, saying to a witness at the start of a lineup, "We really want to identify the guy who did this" can lead the witness to

identify someone in the lineup—even when the perp is not in the lineup. It's bad practice that has finally been banned in most places, though such remarks and hints are still easily slipped in. Even the staff's demeanor or tone of voice can convey the same impression. So the state must rule out the possibility that any such cues occurred. It's not ruled out just because policy should prevent it and the staff claims to have complied. Staff can forget, lie, or err. One solution—not always applied—is that no one in the room with the witness can know who the suspect is or even if the subject is actually in the lineup.

Trivial? Don't ignore such shortcuts just because they seem trivial. A triviality doomed the *Challenger* spacecraft. In the Phantom of Heilbronn case, a miniscule omission led 40 different labs to the same erroneous conclusion that led to the arrest of an innocent person who had been nowhere near any of the crime scenes. No one but jurors can decide that a reasonable doubt is too trivial to consider, and jurors are unlikely to consider anything trivial when you show them its possible results. As you've already seen, you can trace the tiny, unlikely, seemingly trivial reasonable doubts through to their consequences: reasonable doubt about guilt when the state relies on its forensics to convict.

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of the horse the rider was lost.
For want of the rider the message was lost.
For want of the message the battle was lost.
For want of the battle the kingdom was lost.
And all for the want of a trivial nail.

Research or have your expert tell you every possible short-circuit they can think of. Experts don't usually think about this on their own because apparent trivialities don't prove innocence, which is what they're traditionally hired to help achieve.

Reproducibility

Crime labs routinely omit science's key test of reliability: having their results reproduced by an outside lab to make sure they get the same results. Labs shortcut this necessity by claiming to use standards and measures that "create reproducibility." But they don't check, they don't verify. That's like doing everything right when fixing your car's brakes but not road testing them before going 65

on the freeway. Thanks but no thanks. It's how some labs have had lazy or psychotic forensicists turn out hundreds of inaccurate results for years—results that wrongfully put hundreds of people in prison. No external lab ever checks the results. If they had, the first and almost every other wrong result would have been found.

The same applies to the normal, everyday, accidental, easily occurring missteps by lab staff doing the same job many times every day, day in and day out, for months and years.

Using the proper steps and measures does not rule out the known possibility that staff can and often do use them wrong. Having no external check to see if the results can be reproduced is like saying, "We must be right because we did it right." Nonsense. It's easy for a lab to execute a required measure or standard wrong without even suspecting it. This is partly why it's essential to see if an outside lab can reproduce the work. "Oh, we can't, we don't have the resources!" Yeah, well, that's your problem, not the defendant's. Without it, no lab's work is reliable enough to gamble anyone's freedom. And *most forensic errors come from not doing everything right*, not from anything inherent to the method itself.

The lab cannot reliably check for its own errors because it has a strong interest in validating itself.

Labs will be offended by this. But not as offended as justice is when unreproduced lab results lead to convictions that should not have happened.

Expert's Denial of Possible Error

A forensicist's claim of being absolutely right is naïve, incompetent, or (at best) exaggeration. No investigatory or research conclusion can ever be taken as absolutely right. Never. Not once. Science does not allow it. This is not an arbitrary regulation; it's due to how the world actually works. A zero error rate method cannot exist. When anyone claims their work cannot be wrong, they are blowing their own credibility out of the water—at least when the jurors know that a zero error rate is humanly and scientifically impossible.

Forensics' Darkest Side

External pressures can infect forensics by making bias inevitable. For a particularly egregious example, labs in some states get extra money when their evidence is used in a trial that results in conviction.[4] Result: conviction-prone biases on the part of individual staff members and the lab's culture in general, especially

in times of limited budgets. If the state's lab in your case gets paid in this way (they'll deny it, so don't give up easily), use it in trial to show reasonable doubts about the lab's forensics. What's less reliable than a bribed lab? What greater kind of obstruction of justice is there? Jurors resent this kind of pollution, and it creates substantial reasonable doubt.

Further, the work and results of many lab employees often go unsupervised and unchecked. So no one knows when their work is unreliable. You can spot-check assembly-line products for manufacturing errors, but merely sampling a forensicist's work is not enough to rule out reasonable doubts of error.

And more: lab employees often have close contact—including personal and social—with police and prosecution. Interpersonal contact creates substantial biasing factors even in people who try to be completely fair and trustworthy. Look into this kind of personal contact and use it to impeach.

This is not to say that all labs and forensicists are corrupt or incompetent and riddled with mistakes. But neither are they perfect. Mistakes are made unconsciously, and biases are universal and most are unconscious, so both require beyond-reasonable-doubt proof that the investigatory process included ways to prevent their effects. This is mandatory in all scientific investigation.

Fake CV Content

Many expert CVs contain dishonest or mistaken entries including fake degrees, courses, professional positions, awards, schools, courses of study or training publications, and so on. Finding fraudulent entries can take some meticulous work, but when found they provide a triple-barreled set of reasonable doubts. First, a fraudulent entry creates reasonable doubt about whether the expert is qualified to conduct their forensics method. Second, a fraudulent entry creates reasonable doubt about *everything* the expert says. Third, it shows that even after the expert's fraud is exposed, the state continues to rely on that expert's conclusion. Sponsoring intentional deception creates reasonable doubt about everything else that comes from the state. So it's worth the work to find CV fraud.

When you find fraud in any forensic expert's credentials, spread the word to every other criminal defense lawyer you can reach. That way, even after that creep amends the CV, other defense lawyers can use the original to impeach next time the creep creeps into a trial. Knowing how to spot and deal with these creeps is

great. Booting them from the courtroom altogether is even better.

Mistakes, Omissions, and the Necessary Record

Even the best and most honest of researchers, investigators, and analysts make mistakes. Routine and often excessive workload, the universal tendency of humans to slip up, task complexity, and our always-present conscious and unconscious biases increase the odds of mistakes. So on cross:

> Mistakes can be made despite being careful?
> You checked for any?
> Mistakes could remain even after checking?
> If your checking missed any mistakes, you'd have no way of knowing, would you?
> You know of no evidence, do you, that rules out the possibility you or others might have missed finding and correcting every mistake?
> And you cannot rule out the possibility that you missed some mistakes?

Forensic Innovation

Pay extra attention to unusual or novel forensics methods. Some are just plain silly, such as a recent claim by a self-anointed "researcher" to spot lies by analyzing the voice of 911 callers. Yet a judge let it in!

Artificial Intelligence: Friend and Foe

The most concerning forensic innovations are those dressed up like science, such as facial recognition and other kinds of evidence based on artificial intelligence (AI). AI faithfully reflects the biases of its developers and magnifies them every time the application is used. And as AI makes itself more complex—as it's designed to do—it quickly outstrips anyone's ability to go back in to spot its biases. When AI is used against your client—as will happen in the not-distant future—you must know how to undermine it.

AI (ChatGPT) gathered some factors (now verified) that compromise forensic AI reliability, including:

• *Biased algorithms*: AI algorithms can be trained on initial data that reflects the biases of whoever assembled the data.[5] For example, facial recognition algorithms may be more accurate for certain demographic groups than others due to a lack of diversity in the training data.

• *Misinterpretation of data*: AI systems can misinterpret data due to incomplete or incorrect information. For example, a machine learning algorithm might incorrectly identify a suspect based on incomplete or ambiguous data.

• *Errors in data collection*: AI systems rely on accurate and complete data to make reliable decisions. Errors in data collection, such as missing data or incorrect data entry, result in unreliable results.

Forensic Fudge-Words

"Consistent with" misleads jurors into thinking that the opinion is definitive, as if "consistent with" means "is." In fact, it merely means that nothing rules out the opinion. A 1 percent chance of being right makes it *consistent with*. Outrageous, eh? Knowing this, only a biased forensicist would ever use the term. "This trajectory angle is *consistent with* a shot from a tall person" means it's possible—as is the possibility that the victim was bending over, though the witness does not say that part. "The tire mark is consistent with the defendant's car" means—at best—that it's consistent with all 5,000,000 cars with that kind of tire.

I don't recall ever hearing a defense expert or defense counsel explain this to jurors, not even when the forensic conclusion was pivotal to conviction.

"Cannot be excluded" misleads the jurors in exactly the same way. It means, for example, that John cannot be excluded—leaving unspoken the fact that neither can another 100,000,000 people be excluded. Science is a precise endeavor, so it is hard to believe that such sloppy language is inadvertent.

"Without doubt" is an improper phrase for a forensicist.[6] The dictates of logic and science preclude "without doubt" except for patently obvious and objective facts. The expert's certainty or use of the phase "without doubt" creates three reasonable doubts: the possibilities (1) that maybe the expert violated science and logic at other points as well, (2) that they don't know science as well as they profess to, and (3) that they ignored or don't know the required error rate, thereby making their opinion unreliable.

"Reasonable degree of scientific [or forensic] certainty." This

phrase has nothing to do with science.[7] It implies that the entire field or discipline supports the expert's case-specific opinion, which the whole field does not even know about, much less agree with. The phrase misleadingly exaggerates the opinion's reliability. Move in limine to exclude it. If your motion does not prevail, get the state's expert to explain that *he's* the only one who actually is certain to that level about his conclusion, since no one else knows about it.

In general, pay close attention to every term the state expert uses.

Modern Science and the Justice System: Some Inconvenient Truths

The root of all superstition is that [people] observe when a thing hits, but not when it misses.

—Francis Bacon

Lies and Mistakes in Testimony

Research has consistently shown that people's ability to detect lies is no more accurate than chance, or flipping a coin. This finding holds across all types of people—students, psychologists, judges, job interviewers and law enforcement personnel.

—Laura Zimmerman[8]

Don't walk under a ladder. Don't let a black cat cross your path. Keep a rabbit's foot in your pocket. We mock (and sometimes share) such superstitions—yet the criminal justice system encourages and even demands equally groundless superstitions in trials. I don't mean wearing your lucky socks, carrying the same briefcase as the day you won your first trial, or writing with your lucky pen. I mean antique beliefs that are nothing but superstitions such as the naïve belief that jurors can reliably gauge the credibility of witnesses, which is a scientific impossibility for any human being.

Today's trial system was developed long before anyone knew much about how people observe, create and store memories, report on what they observed, and many other trial-relevant human characteristics. For example, jurors are humanly incapable of judging the reliability of *any* testimony just by watching and

listening to the witness. Half their judgments will be wrong.

Twenty-first-century science has shown that many trial-related assumptions are wrong. What we now know is that:

> Memory is not reliable and full accuracy is all but impossible.
>
> Eyewitnesses cannot reliably observe, retain, and report what they see.
>
> Multiple eyewitnesses in agreement are not necessarily more likely than just one to be correct.
>
> Jurors cannot reliably tell when testimony is honest. (Error rate = 50 percent.)
>
> Jurors cannot reliably spot mistaken testimony. (Error rate >> 50 percent.)
>
> Oaths and affirmations—and thus sworn testimony—are unreliable.[9]

Current science knows that memory is unreliable, eyewitness testimony is dicey, and jurors and coin flipping are equally useless at detecting dishonesty or mistakes.

Will the justice system adjust to 21st-century science? Unlikely, at least during the 21st century. Jury instructions will continue to make jurors think themselves capable of gauging witness credibility even though they unquestionably cannot. Convictions will be based on mistaken belief in eyewitness reliability. Shaky forensics will go on convicting. These things are likely to get worse because the entertainment and news media—more influential than ever—go on reinforcing them. So as the late Richard Pryor said about many things, "We're in trouble."

Unless . . .

Unless you can get jurors to apply what science has learned. You can do this without invading the province of the jury and even, if necessary, without expert testimony or complex explanations.

Reasonable Doubts: Human Limitations

Scientifically confirmed human limitations have shown that jurors are inherently incapable of meeting the expectations of the justice system, including the expectation of reliably evaluating witness credibility. Reliable observation of events, facial recognition of strangers, and most kinds of memory fall outside the human skill set, as does *reliable* recognition of a speaker's (witness's) possible dishonesty and error.[10] As a result, the trial system functions only because humans are hardwired to *feel* certainty even without logical

reason. If jurors knew this—and could accept it—few prosecutions would meet their burden.

We can't convince every juror—and probably not even you—that all event observation and memory are flawed and that no one can rule out the ever-present possibility that someone—*anyone*—talking is either mistaken or lying. But we can make enough headway to help block convictions by raising reasonable doubts.

> [I]f something needs to be recollected with complete accuracy, such as in the event of reporting marks or giving eyewitness testimony, memory is not reliable. Similarly, our confidence in the accuracy of our memories also appears to be unreliable, with the literature reporting a multitude of factors that can affect the accuracy of recollection while the individual continues to believe their recollection is accurate (Chatard, Guimond, & Selimbe-govic, 2007; Loftus & Palmer, 1974; Roediger & McDermott, 1995). The unreliability of memory is also not limited to complex information or events, but affects simple recollection of personal information. We should, therefore, not rely on memory for information in which perfect accuracy is required, such as in criminal proceedings.[11]

Let's look first at these recently verified universal human limitations, then explore how to use them in trial.

Mission Impossible: Testimony

This section's methods reveal reasonable doubts about not only the state's testimony but your side's, too. And that's fine. Reasonable doubt about *defense* testimony logically creates reasonable doubt about the state's corresponding testimony.

The Fundamental Reasonable-Doubt Challenge

See p. 129 on closing for Rule Out's fundamental challenge—the Dodd question—of the state's witnesses, which is among your most effective means of undermining state testimony. Look at the challenge now as background for the material that follows, material that enhances your use of the challenge on cross and in closing.

Lie and Error Detection

Many people believe they're good at spotting lies, but they're

wrong. No one is. People who think they are have no way to know how many lies they don't spot.

Research demonstrates that humans spot only 50 percent of the lies they hear. The best-trained experts spot no better than 64 percent. We're even less adept at being able to tell beyond reasonable doubt when a speaker is being honest. Though humans are skilled liars, they're nearly blind as lie detectors. Information from watching and listening—the juror's perspective—does not help in spotting dishonesty. Appearances deceive, as do tone of voice, race, distance between eyes, eye contact, eyes shifting, internal physiological changes of any kind, body language, sweating, vocal quality/pace/sound, or any of myriad other visual/aural cues. Neither these nor any other visual or aural cue can come close to ruling out reasonable doubt about honesty. In fact, most such cues are easily faked, which is well within the skill sets of frequent liars. Practiced liars—such as many politicians, salespeople, and trained actors—fool people largely by mastering the art of fabricating these cues. "I could just tell by how he talked that every word he said is true!" No, you could not tell any such thing. No one can.

To be able to tell beyond reasonable doubt when a speaker is truthful and unmistaken requires additional evidence that is in itself beyond reasonable doubt. (Evidence about which there's any reasonable doubt is not enough, because reasonable doubt + reasonable doubt = reasonable doubt.)

Spotting Mistakes

Spotting mistakes is even harder than spotting deception. There are only two ways: either by means of internal contradictions in what someone says, or by knowing in advance (or by later learning) the accurate truth from an outside source. You already know the outside fact that Alaska is a state, so when I say it is, you know I'm not mistaken or lying. But if I say I'm wearing white underwear, you have no idea if I'm mistaken or lying because you have no outside way to know (at least you'd better not!).

Thus, evaluation of witness credibility is a crapshoot. Jurors will think 50 percent of the liars are telling the truth and do even worse at spotting mistakes. No human—or device—can make the call anywhere close to beyond reasonable doubt.

Yet jurors tend to believe most state's witnesses by default.

In voir dire, when you can, ask which jurors feel they can rule out dishonesty and error by just watching and listening (p. 98). Don't ask if they can spot deception, because many people think

they can. The question is whether they believe they can reliably rule out the possibility of deception in a witness. Once they do so, they'll be unlikely to change their minds enough to admit to reasonable doubts when they hear from your witnesses.

The Complete Stranger

Few people trust complete strangers when the consequences of being wrong would be awful (i.e., when the stakes are high). We don't invite complete strangers to babysit our kids. We don't lend complete strangers a lot of money or our car or house keys or invite them in to spend the night (as most religions and older cultures require). We order our kids *never* to talk to strangers, *never* to let strangers into the house, *never* to get into a stranger's van. Even when a stranger shows us letters of reference and resumes, no matter how credible they seem, we still need more to trust them with our kids. Or cars. Even our lawnmowers. Especially our lawnmowers, at least in my neighborhood.

This almost universal mistrust of strangers exists in many contexts, not just child safety. So jurors come to court already knowing this: DO. NOT. TRUST. STRANGERS.

Complete strangers are even less reliable when we cannot converse with them.[12] Testimony is not a conversation, so we get even less credibility-evaluating information from testimony than from conversation. That's why employers interview job applicants, lawyers talk with clients and others critical to the case, and there are few trusting relationships in which one of the two sides hardly speaks.

And oh yeah, there's one more thing about complete strangers: **To jurors, almost every witness is a complete stranger.**

We need only point this out to jurors and, when possible, get jurors to apply the same standards to complete strangers on the stand as they do to complete strangers in their own lives when the stakes are high.

When you ask about this in voir dire, some jurors will say they can't even rely on the credibility of people they know well. Not every parent is gullible enough to believe that their teenager is a non-drug-using virgin who finished their homework.

Bring your complete-stranger theme into opening and reprise in closing: "You'll hear [You've heard] from witnesses who are complete strangers to you. So you'll need supporting evidence to rule out the possibility they're either mistaken or dishonest."

This is the most recent Rule-Out development, so put on your

own thinking cap and help us. Let us know when you come up with other ways to show jurors that humans are lousy at reliably detecting lies and logically even less reliable in detecting mistakes.

Why are inaccuracies so frequent in testimony? Mostly it's due to flaws in the human memory system and the confounding effects of cognitive biases on observation, memory and memory storage, and testimony. Let's go to memory.

The Delusion of Memory

"Our memories are like pieces of a shattered glass we try to put back together, but we can never quite get back to the original."[13]

Gaps, Blurs, and Other Defects

Human perception and memory are not reliable, at least not beyond reasonable doubt. All that we see and hear is regularly compromised by a vast range of factors. For just one of almost endless examples, a crime witness afraid of the gun focuses their attention narrowly on the gun in the perp's hand and thus hardly perceives the perp's face. The face can actually be a gap or blur in the witness's memory. The brain, hating gaps and blurs, unconsciously fills in the gap or blur with a fabrication shaped by cognitive biases, by what others say, by simply thinking about it, or by confusing the perp's face with some similar face—or a combination of those and other factors.

Unstable When in Use

Our memory of an event is commonly distorted by talking or even just thinking about it. This is because calling up a memory pulls it out of storage—and out of storage, the memory is unstable, vulnerable to unconscious alterations.

These alterations come from external as well as internal factors. External distorting factors include discussion about the memory or being questioned about it. Internal distorting factors can include emotional reactions to memory while thinking about it. The presence and effects of those factors are common.

The memory remains unstable—easily changeable—for as long as it's thought about or talked about. Then it is returned to storage with its distortions, where it restabilizes less accurately than before. So next time the memory is taken out of storage, it's no longer of the event itself but of its most recently stored variant. Unaware of

these unconscious mental processes, we continue believing that the memory is accurate. In fact, each new version of the memory can make us more certain that it's correct even as it's getting less so. But despite our certainty, it more likely gets less and less accurate each time we pull it out of storage.

This is just one of the scientifically verified reasons that memory is a flawed tool.[14] As quoted earlier, "Our memories are like pieces of a shattered glass we try to put back together, but we can never quite get back to the original." No one is sure whose quote that is, but it expresses what science now knows about memory.[15]

Mental Pictures?

When a witness (or anyone) says, "I can see everything in my mind's eye like a photograph," they're wrong. The brain does not take photographs, especially not of strangers' faces or events, and especially not of rapidly progressing or frightening events. Instead of a mental photograph, memory is a hastily thrown-together rough sketch of something only partly observed and with many distorting interpolations, such as gap-fillings. That's why face and event memory cannot be accurate beyond reasonable doubt without verification by other evidence that is in itself beyond reasonable doubt.

Certainty

Almost every memory contains some error. Yet we're often certain that our memory is accurate. Certainty, however, is not a factual or logical conclusion; it's only an emotional feeling. But it feels certain, so people believe memory can be certain—including witness memory. But an honest witness's certainty does not rule out reasonable doubt. You'll introduce this concept in voir dire. And you'll get prospective jurors to tell you about memories they were certain of that later turned out to be mistaken.

Unconscious Gaps in Memory

A large part of the memory problem—especially the kind of memories that convictions depend on—is the brain's inability to notice and remember everything in an event. The brain selects what to notice and thus what to remember. Selection is based on factors such as apparent threats of danger, visual highlights (e.g., very bright or dark colors or contrasting colors or flashing lights), ambient sound, motion toward ourselves, changes in direction or

speed of a motion, previous experiences and observations—real and from fiction such as books and movies—expectations during the event, subjective judgments, and a wide range of biases of every kind. The selection is *always* incomplete and affected by internal subjective pressures. This is why two people rarely agree on everything about any event.

For example, someone observing from safe cover—even by standing behind someone else—might not be afraid of the perp's gun so won't fix their attention on it instead of the perp's clothing or face. But an exposed observer will rivet their attention on the immediate danger of the gun, and their memory of the perp's face or clothing will likely be a gap or blur to be filled in later. That observer will feel that the fictional fillers are real, so they'll be mistakenly certain of the clothing and face. Result: in trial, they'll honestly and confidently feel certain about their memory of face and clothing. And yes, this happens a lot. The only variable is which details are accurate and which are blurs or gaps.

Further, witnesses are likely to see and remember the gist of an event, with the rest blurred or gapped and thus more likely inaccurate. But the gist of an event to the observer is often different from what is considered important in trial. The gist on the scene was the threat of the gun, while the important part in trial could be the gaps and blurs, such as face and clothing, which were of little importance to the frightened observer. So the witness who knows there was a gun might also "know" the guy's jacket was blue when in fact the color was a filled-in gap.

In sum: observational gaps and blurs along with their fictional fill-ins, attention selection, juror inability to reliably know when a witness is correct beyond reasonable doubt, the ubiquity and force of cognitive biases (later), distortions compounding themselves each time the memory is pulled out of storage, and other factors combine to make reasonable doubt in almost all testimony unavoidable.

These memory distorters explain how two siblings can each be certain of a family memory without agreeing with each other and without either being accurate. And these distortions explain why it is illogical to expect jurors to ever be able to know whether a witness's memory is correct—even beyond the effects of dishonesty.

We can castigate the justice system for not instructing jurors about these scientifically established points. But it is what it is. Science, as slow as it sometimes is, is the rabbit to the tortoise that is the law. So we have to take care of—and take advantage of—this ourselves, often without an expert. So keep yourself up to date on the science about human observation, attention, memory, and

related topics. An excellent start is *The Invisible Gorilla*, *The Memory Illusion*, and *Remembering*. These books and more suggestions are listed in the bibliography.

Cognitive Biases and Reasonable Doubts

Cognitive biases are probably the strongest and most universal distorters of observation, memory, and judgment. We are all subject to their ever-presence. They powerfully distort witness observation and memory, jury perception and reactions, and almost everything else related to how and what people think and decide. *Thinking, Fast and Slow* (see bibliography) is a good introduction to cognitive biases and their power. What follows here is enough for you to start putting them to use now.

A cognitive bias—a deviation from the norm—tilts our perception, thinking, feeling, and judgment away from the objective norm. When you step on the brake, your car can pull to the right due to an imbalance—a tilt—a bias—in the braking system that creates a deviation in direction (a bias) from the norm of going straight. The Leaning Tower of Pisa has a bias: it leans away from the objective norm of being upright. The norm is objective. Cognitive biases are *sub*jective, so they tilt us off the norm.

A cognitive bias bends our judgment and decision-making away from objectivity even though we feel 100 percent objective. You may like to believe you have no objectivity flaws, but you certainly do, though you're rarely conscious of them. And, amazingly, even when you know you have a particular cognitive bias, you can rarely resist its effect.

Cognitive biases can affect every reaction, decision, and judgment any of us ever makes, from the weightiest down to the most trivial, such as irritation with a spouse for leaving the damn light on *again*.

Without cognitive biases, everyone would make objective judgments and decisions—which means we'd make nearly all the same ones.

Why Are We Beset by Cognitive Biases?

Because they're fast and they save a lot of the energy that careful consideration takes. Cognitive biases are shortcuts that enable us to make decisions without taking the time to objectively observe and analyze. This timesaving is often critical. A primitive ancestor who saw a tiger and took the time to objectively analyze the situation

would be shredded and gobbled by the time their brain had rationally decided what to do. To survive tigers, for example, our brains developed a tiger bias: see a tiger, run away. Instant reaction. No thought. It's knee-jerk reaction. Ask questions later. Or never.

While these high-speed shortcuts create distortion, they are not flaws in the system. They're among its most salient—and necessary—strengths, essential for our species' survival and well-being. While obviously they can drive us to wrong or needless conclusions (my primitive ancestor would flee a tiger that turned out to be dead), it's safer to make the fast decision than risk the time for a slower objective analysis. So when we don't have the time for an objective decision—which takes critically longer than decisions driven by cognitive biases—the cognitive bias is literally a lifesaver.

Cognitive biases accomplish their extraordinary control in several ways even in decisions we make over time—such as deciding verdicts. They do this by assigning more weight to factors that favor the bias and less (or none) to factors that don't, thus tilting our judgment and decision-making away from the norm of objectivity. So, for example, our bias that favors someone we love and trust and who's accused of a crime makes us give extra weight to the exonerative factors and less or none to the inculpating factors. In fact, cognitive biases usually make us decide instantly and unconsciously that our loved one is innocent and only then adjust our perception of the weights of the factors so that they seem to logically support innocence. In this way, the logical part of our decision-making process often—some scientists would say most often—does nothing more than rationalize the decision the cognitive bias already created in the unconscious mind.

Biases do their work by directing the flow of our brain chemicals in ways that shape our perceptions, reactions, memories, thoughts, feelings, and other factors that underlie judgment, decisions, and behavior. In this way, cognitive biases affect almost everything we decide, do, and think, not just about tigers. Next time you wonder why parents think their ugly baby is so beautiful, blame *offspring bias*. In general, analyze anything that anyone feels or believes or decides or does and you'll likely find cognitive biases at work. Including in yourself. To practice, think about the cognitive biases that drive the voting decisions of Americans.

Rule Out works by being an external *control: it uses certain cognitive biases (such as the bias against being disrespected) to make jurors want to decide the case based on objective logic.*

Even AI is affected by the very cognitive biases that influenced how its creators designed the system and chose its initial data.

Recall that in high-stakes situations, we're biased (cognitively biased) against trusting a stranger. We lack the information necessary for an objective decision, so our *stranger-danger bias* takes over. We have over 200 other biases, each poised to act as circumstances dictate. Many—such as stranger danger—are holdovers from our species' primitive days when they were necessary to our survival, but they remain with us today.

Here's the point: Cognitive biases affect the testimony of every witness and the way in which jurors perceive and react to testimony (and you and the prosecutor and everything else). *So a key part of trial preparation should lie in carefully reviewing a bullet-point list of the many cognitive biases for those that can affect your case*[16] with respect to jury selection, testimony, and juror decision-making.

This is crucial, because in spite of Rule Out's effectiveness in getting jurors to think objectively, decisions about whether something is a reasonable doubt can still be driven by biases—as can witness evaluation, willingness to follow the law, and other pivotal factors in trial.

Different biases will be relevant in different cases, even in similar cases. The array depends on the specifics, such as the personality types of the people involved. So the *obesity-repulsion* bias will be irrelevant in some cases and very relevant in cases where a key player is obese. And in many but not all trials we're concerned with how easily jurors believe police witnesses. *Authority bias* is the tendency to unduly trust whoever or whatever is in authority—even when there's no logical reason for that trust. *Anti-power bias* can make a juror extra-suspicious of the state, a particularly salient bias in our current era. Your job, in part, is to identify the biases and then devise voir dire questions that help you see which prospective jurors have which biases. You should also use cognitive biases to help you find, for example, possible deceptions and errors in witnesses.

Examples of Cognitive Biases

(Different authorities often use different labels for the same biases.)

Obesity bias is a particularly hurtful bias and—like all biases—a tilt away from the objective norm of judging people by more reliable factors than their weight. Obese people are in fact no lazier, smellier, sloppier, or jollier than anyone else. It's an unconscious shortcut belief that does what all biases do: it obviates the need for time and effort to determine a logical or objective truth about someone. The bias can be conscious, but not necessarily.

Illusory bias is less nasty but equally strong. It's the off-norm tendency to think two unrelated events are connected. Among other things, this is the source of many superstitions, such as the belief of a lawyer friend of mine about being better in trial when wearing the same set of socks from voir dire through closing. Less absurdly, illusory bias can lead jurors to unconsciously assume that, say, some objectively irrelevant characteristic—such as nervousness—of your client makes guilt a lot more likely. This convincing but illusory connection can be pivotal, though it's less likely to lead to conviction when you're using Rule Out.

Salience bias is the automatic and unconscious tendency to give undue weight to emotional factors and too little to blandly neutral factors.

Effort justification is your tendency to put greater value on something you worked hard to get even when there's no logical basis—no objective norm—for its value to be greater.

Pattern bias, similar to illusory bias, is the tendency to see patterns where there are none. This is one way conspiracy theories start. It also affects juror decision-making. Jurors who see that a defendant did A tend to believe the defendant also would have done B even when B is barely similar. More favorably, it helps jurors decide that a witness is wrong (or dishonest) about something on the grounds that the witness was wrong (or dishonest) about something else. Sometimes this gives you reason to emphasize a witness's trivial error or fib.

Hindsight bias is the near-universal tendency to believe that something obvious about an event after it happens was equally obvious in advance. This bias is often at work in negligence cases.

Availability bias drives jurors to give greater weight than logic (the norm) would dictate to the most available and salient information they have at hand. This is why we focus juror attention throughout trial on the reasonable doubts and not on the defendant and their actions. In fact, the more you *deny* the specific acts the state claims the defendant did, the more jurors will focus on those acts—even to the point of subordinating reasonable doubts. We often see this in politics: Candidate A calls candidate B a liar. Candidate B spends lots of time showing that he's not a liar. Result: it becomes a major issue in the campaign, which is why some politicians are smart enough not to spend much time responding to the accusation.

Sunken-cost fallacy drives people to continue working at or investing in something no longer worthwhile just because they've already put so much into it.

Loss-reluctance bias makes us hate and thus resist losing more than the potential value (the norm) of the loss logically warrants.

Danger-avoidance bias distorts objective observation and memory of violent or potentially violent events by focusing attention on whatever seems most threatening (the pistol, the flames, etc.) at the expense of everything else, as we saw earlier (p. 64).

Importance bias or *attention-magnet bias* can distort memory in ways intended to make someone feel important by being involved with something important. This can, for example, drive an observer who's not sure they saw the guy into "remembering" they did, making them important to the police or the media.

Team (tribal) bias leads us to make fast, unconscious choices that favor "our team" and that disfavor the other team—the alien tribe. This is why many forensicists who think themselves honest can unconsciously favor the state in how they execute their work and come to their conclusions. They don't necessarily realize they're doing this so are unlikely to have taken the necessary analytic precautions against it, as science requires. ("You took no measures to offset any possible bias you might unknowingly have that favors the government, did you?") So find out and compare how often the state's forensicist spends time with police and prosecutors—especially off-work time—as opposed to the time they spend with defense lawyers. This cognitive bias is so familiar that some jurors who learn about the time-spent differential will conclude on their own that the bias is probably there.

Confirmation bias is among the most common of cognitive biases. Once we start to believe something, we have a strong tendency to continue believing it—even in the face of strong contradictory evidence. We all do this with almost every belief we have. Confirmation bias does its irresistible work by controlling how we perceive new information related to a belief we hold. We give extra (off-norm) weight to new information that supports the belief. We give less weight, sometimes none, to information that contradicts our belief; alternatively, we unconsciously distort our perception of new and conflicting evidence so that we receive it as being supportive of our belief. Confirmation bias interacts with many other biases, such as team bias, to increase the strength of a belief beyond the point of anything being able to influence it. For example, this is why we trust a candidate or a team or a family member even when there's objective proof of untrustworthiness—as almost every newscast or social media response illustrates.

These and the other 200-plus cognitive biases provide criminal defense lawyers with great insight into how people make decisions,

fill memory gaps, interact with other people, live our lives, and on and on. These insights can help you shape your case and find reasonable doubts that would otherwise escape your attention.

Cognitive biases are not defects in the brain's system; they are among its fundamental characteristics. They are not emotions, but they can create emotions—emotions that can be for or against us. But to our particular advantage is the fact that cognitive biases sharply increase the number and degree of reasonable doubts in testimony, including in forensics opinions.

Subjectivity (Again)

Observation and memory are subjective. As such, they are often distorted by unknown variables (including cognitive biases). That's why news reporters, police officers, and others who gather witness reports confirm that multiple witnesses rarely have identical memories of an event, and often the differences are significant. Observation and memory routinely mistake the sequence of events; the number, identities, descriptions, clothing, and characteristics of the people involved; who said what; and who did what—even when each of the witnesses is certain they're correct about everything. Some will be certain the guy in the blue jacket had a cell phone in his hand; others will remember that her jacket was brown like the pistol in her hand, and others will say white shirt and holding a wallet or a knife or a fish or nothing.

Further, immediate and recent memories change as time goes by. Not just sometimes but almost always.

Voodoo

Jurors take their honesty/accuracy-discerning help wherever they can find it—including from a vast and fantastical range of folk theories for spotting liars, such as eyes "too far apart," lack of eye contact (a strong indicator of either truth or lie and no one can tell which), nervousness (*nervousness*, for God's sake! *Many* honest witnesses—including many trial lawyers when testifying—are nervous), foreign or regional accents, religion, race, hair style, clothing, weight, height (short people lie?), apparent devoutness, and—this is real—whether the toes are parallel. I heard this while preparing this book from two jury-eligible citizens.

And there's "She sure sounds like she knows what she's talking about!"

Or "She has the credentials."

Or “She reminds me of Aunt Lavinia, who was never wrong [right] about anything.”

Eyewitness ID

This is a thoroughly undeserved persuader based on the prebiblical myth that honest eyewitness testimony is reliable. We undo this mastodon-scat belief largely by means of the fundamental reasonable-doubt challenge (p. 129), along with the points covered next.

With the challenge in mind, establish that the eyewitness is a complete stranger to jurors who is trying to identify another complete stranger. This double-stranger distancing creates greater reasonable doubt than just trying to impeach the witness. It combines the human inability of jurors to spot error or dishonesty in anything a complete stranger says with the jurors’ inability to reliably determine that there are no reasonable doubts in the eyewitness’s testimony.

Eyewitnesses are wrong with stunning frequency. Ohio State University research shows that mistaken eyewitness IDs caused *half* the convictions in their study. The Innocence Project reports that 24 percent of the wrongful convictions they overcame were based on mistaken IDs. A Western Michigan University study showed 72 percent.[17]

Eyewitness ID is abysmally unreliable mostly because evolution did not endow us with a reliable ability to differentiate among strangers. Our primitive ancestors needed no such ability. *Every* stranger was equally dangerous because every stranger was likely to be up to no good and to carry communicable diseases from their own tribe. Since there was little survival advantage in being able to tell one stranger from another, we never evolved much ability to. (This is largely why interracial identification of individuals is so often wrong.)

Based on these and other universal human factors, eyewitness ID *always* carries reasonable doubts no matter how certain the witness is. Certainty is a *feeling*, not an objective conclusion drawn from facts or logic. But since eyewitnesses in trial are usually certain that they’re correct, jurors buy into that certainty out of their belief that their own observational and memory abilities are reliable. But there’s always a significant possibility that a person is wrong about what or who they remember.

For eons, this has wrongfully imprisoned and killed people.

People are routinely wrong about what they’ve seen even in

normal everyday life. Add the crime-scene levels of emergency, threat, and stress, and their error rates can be expected to skyrocket.

Bullying the Jurors—and True Beliefs

The court makes jurors keenly aware that nobody wants a hung jury. But a conviction stemming from the court's pressure has no logical validity. Even when the judge does not mean to bully, when a judge pressures a jury to reach a decision, many jurors comply *even at the cost of being fair*. After all, the judge seems to want them to compromise, even though compromising true beliefs is an illegitimate basis for a verdict. But it's often inevitable due to such forces as authority bias, which is strong enough to pull jurors off the norm of being fair by warping their judgments into concluding the defendant is guilty after all. That's why a pressured verdict cannot be reliably fair, and most are probably not.

"If you don't come to a unanimous decision, we have to do all this all over again," bemoans the authority-figure-in-chief—a prejudicial statement if ever there was one, and one that has absolutely nothing to do with justice. The Allen charge routinely bullies jurors into making decisions they don't truly believe in. The small print (not to give up their true beliefs) is barely mentioned or emphasized and never rewarded.

The Allen charge—like all pressure on jurors to unite—mainly tests which side's jurors best withstand outside pressure. It benefits nothing but efficiency. As with most benefits, it comes at a cost: justice.

Jurors' rights questions 3 and 4 (p. 96) in voir dire and reprised in closing will arm jurors to resist improperly yielding to the Allen charge's bullying. Reinforce it by telling jurors in closing that no one has the right to ask them to convict *when they have a true belief that there's even one reasonable doubt*.

Don't say anything that sounds like you're trying to get jurors not to deliberate, which is very different from urging them not to give up their true beliefs.

Misleading Jury Instructions

Some jury instructions, intentionally or not, misleadingly diminish the state's burden.

For example: "Beyond reasonable doubt is the level of certainty you use in your most important decisions in your own lives." This is

simply a false statement.

Or "Beyond reasonable doubt means an abiding belief." It does not. You can have an abiding belief at the same time as you have reasonable doubts.

Or "A reasonable doubt is not all possible doubt."

Or "Use your common sense."

Let's look at how to deal with these and other distortions.

"A reasonable doubt is not every doubt." True but misleading. Imaginary, capricious, illogical, speculative, and fantasy doubts are not reasonable doubts. Reasonable doubt means every doubt based on reason, which means it's logical—logically inferred from the evidence. The U.S. Supreme Court says a reasonable doubt is a doubt based on reason. In this context, *reason* can only mean *logic*. It is fine for the court to say that beyond reasonable doubt does not mean beyond every possible doubt, as long as you explain, during massaging the instructions (p. 146) if not earlier, that it does include every *logically* possible doubt. *Only the jury*—not the judge—can decide whether a doubt is logically possible.

One state's jury instruction tells jurors to "*look for truth, not doubts*." This can hurt Rule Out unless you explain that *the truth you're looking for is whether the state has ruled out all the reasonable doubts*.

Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of their own affairs. This nasty little burden-shrinking trick misleads a lot of jurors. This is because in our own affairs, few decisions that ever face us can be made beyond reasonable doubt. The decisions that are "most important in your own affairs" can include whom to marry, where to go to school, choice of profession, and so on—none of which can be made beyond reasonable doubt. When viewed in the rearview mirror, they may seem to have been made beyond reasonable doubt, but at the time of the decision the reasonable doubts were almost certainly plentiful. Further, in our lives we're often forced to gamble to at least some extent when we make important decisions. Those gambles are the reasonable doubts. The only alternative to this dilemma is to make no decision at all, which is the same as making a decision. But on juries, we are not forced to make a decision. And "not guilty" is the equivalent of no decision because it really means not enough evidence to convince everyone.

Additionally, you can circumvent this silly instruction by suggesting a "decision" that everyone on the jury can support: that there's *not enough evidence* to convince every juror of guilt. This can

return a not-guilty verdict before a jury in conflict has a chance to hang. And when the court pressures jurors to come to a decision, they can easily decide that *there's not enough evidence to convince* all the jurors. That means checking "not guilty." In closing you can argue, "If you truly believe there are one or more reasonable doubts but not everyone agrees, and after lots of discussion those true beliefs are still there, then check not guilty on the verdict form. It means there's *not enough evidence* to convince every juror of guilt."

Comparing Reasonable Doubts to Decisions in Your Own Lives

Florida attorney Thomas Hudson heard the warning about this instruction (comparing *beyond reasonable doubts* to decisions in your own lives) on a webinar. He sent me the following suggestion. With few tweaks I include it here. I suggest you use it or something like it in every case even when you don't have that offending instruction.

In voir dire:

I have two little girls. They are the most precious thing in the world to me. And if you ask me what is THE most important decision I ever made, it's the decision whether to tell them it's safe for them to cross a busy street.

That's what I think of as THE most important of my own affairs. What's yours?

Having set the bar far higher, Thomas wrote me, than deciding whom to marry or where to live or what to do for a living, I get answers that parrot mine. They almost always deal with the health of their children.

Then in closing I remind jurors how we talked about our most important affairs—such as the well-being of our children—and that that's the level of certainty they need to rule out any of the reasonable doubts in this case. "Would you tell your child to step off the curb based on the kind of reasonable doubts in this case? Do you let your kids cross unless you see for yourself that there's no possible reasonable doubt about it being safe? Because that's how certain the law requires you to be in this case."

In voir dire, you might want to add:

> Would it be OK for your children to step onto a busy street based on the word of a complete stranger? Even a stranger who seemed honest and helpful? Could he or she be mistaken? Or up to something? How would you know? Or would you keep them safe on the sidewalk until you could see for yourself that there are no reasonable doubts—no logically possible dangers?

Beware misleading phrases in the jury instructions, such as moral certainty, grave doubt, and substantial doubt. Such phrases deprive defendants of due process. See, for example, *Cage v. Louisiana*, 498 U.S. 39 (1990).

Moral certainty can invite burden-lowering influence from a higher power, and morality from a higher power will trump logic. If you're stuck with these words, you might want to explain that moral certainty means they must be morally certain there are no reasonable doubts.

Grave doubt also deprives defendants of due process by lowering the state's burden. Explain that a *grave doubt* is any doubt that makes conviction illogical and that every reasonable doubt makes conviction illogical.

Substantial doubt is a particularly egregious phrase. And it's a sneak attack. In legal parlance it merely means something real. But to jurors it means big. It's crucial that you explain this to jurors: "Substantial means it has substance—it's real. Not necessarily big but real. Logical. So substantial doubt means a logical doubt."

Strong or firm belief: "Beyond reasonable doubt means a strong [or firm or abiding] belief in guilt" misrepresents the burden because a strong or firm belief can—and often does—coexist with reasonable doubt. "I firmly believe I'm marrying the right person" does not mean you have no reasonable doubts about it. "I'm certain that law school was [or was not] the right choice for me" does not mean an absence of reasonable doubts about it.

In voir dire, you can ask prospectives for their own experiences with things they firmly believed or were certain about but knew at the time that there were some possible reasonable doubts, even small ones. For several reasons you should favor jurors who report having had such experiences.

More about Certainty

Science confirms that *certainty* is actually an emotional feeling.[18] People who are certain about something are no more frequently

right than are people who don't feel certain. There's *no* correlation. "I'm sure" really means "I *feel* I'm right."

In closing, with or without having this kind of instruction (firm belief, certainty, etc.) you might say something like this: "My friend is certain it's safe for her to drive 85 mph on our 65-mph freeway. She's done it all her life, she's a great driver with fast reflexes and a good car, she's never wrecked, and so on. But as certain as she feels, it's not *logical* because many people who feel just as certain eventually get into a wreck. It's not logical because she never ruled out all the reasonable doubts. You can be certain only when you see that there are no logically possible reasonable doubts."

Scrutinize your jury instruction for all such burden-lowering terms, and devise ways to explain them that keep the burden as high as it's supposed to be.

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1. One of many well-documented texts about the shortcomings of forensics: *Autopsy of a Crime Lab: Exposing the Flaws in Forensics*, by Brandon L. Garrett.

2. Itiel E. Dror & Nicholas Scurich, Misuse of Scientific Measurements in Forensic Science, *Forensic Sci. Int. Synerg.* 2, Sept. 6, 2020, pp. 333–338. doi: 10.1016/j.fsisyn .2020.08.006.

3. For example: "[W]here a technique has been repeatedly applied and tested by law enforcement and by courts for over a century, the Court does not believe that the absence of scientific data, without more, should be the death knell for such testimony." United States v. Prime, Case No. CR01-03 10L (W.D. Wash. Sept. 20, 2002).

4. Roger Koppl & Meghan Sacks, The Criminal Justice System Creates Incentives for False Convictions, *Criminal Justice Ethics* 32(2), 2013, pp. 126–162.

5. There's More to AI Bias Than Biased Data, NIST Report Highlights, *National Institute of Standards and Technology* (Mar. 16, 2022), https://www.nist.gov/news-events/news/2022/03/theres-more-ai-bias-biased-data-nist-report-highlights.

6. Gerald LaPorte, Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science, *NIJ Journal* 279, April 2018, p. 11, https://nij.gov/journals/279/Pages/wrongful-convictions-and-dna-exonerations.aspx.

7. National Commission on Forensic Science, Testimony Using the Term "Reasonable Scientific Certainty," *National Institute of Standards and Technology*, p. 1, https://www.justice.gov/archives/ncfs/page/file/641331/download.

8. Laura Zimmerman, Deception Detection, *American Psychological Association* 47(3), March 2016, p. 46, https://www.apa.org/monitor/2016/03/deception#:~:text=Research%20has%20consistently%20shown%20that,chance%2C%20or%20flipping%20a%20coin.

9. Nicolas Jacquemet et al., Truth-Telling under Oath, 2017, https://

www.canr.msu.edu/afre/uploads/files/Shogren_Paper.pdf.

10. See p. 59.

11. Lola Henry, Is Memory Reliable?, *The Classic Journal* 2022, https://theclassicjournal.uga.edu/index.php/2022/12/01/is-memory-reliable/#:~:text=While%20memory%20appears%20fairly%20reliable,testimony%2C%20memory%20is%20not%20reliable.

12. Thanks to Michigan trial consultant Eric Oliver for this useful concept.

13. Multiple sources, including Isabella Leitner in *Memories of Auschwitz*.

14. This is another area you should learn as much about as you can. See the bibliography for suggested readings, including about the cognitive biases that so often distort memories.

15. J.L.C. Lee, K. Nader & D. Schiller, An Update on Memory Reconsolidation Updating, *Trends Cogn. Sci.* 21(7), July 2017, pp. 531–545. doi: 10.1016/j.tics.2017.04.006. PMID: 28495311; PMCID: PMC5605913.

16. A handy annotated list can be found on Wikipedia's List of Cognitive Biases.

17. Causes of Wrongful Conviction, *Western Michigan University*, https://wmich.edu/sociology/causes-wrongful-conviction#:~:text=Eyewitness%20error%20is%20the%20single,convictions%20overturned%20through%20DNA%20testing.

18. See, for example, *The Delusions of Certainty* by Siri Hustvedt (Kindle edition).

Chapter 7

Reasonable Doubt and Law

By Elliot Abrams

Reasonable Doubt Means Rational or Logical Doubt

That "'the circumstances must point to guilt and exclude to a moral certainty every reasonable hypothesis except that of guilt' is merely another way of saying that the jurors must be convinced of the defendant's guilt beyond a reasonable doubt."[1] "[To establish] guilt beyond a reasonable doubt, . . . whether the proof be direct or circumstantial[,] it must be such as excludes any rational hypothesis of the innocence of the [defendant]."[2] "The standard of proof beyond a reasonable doubt requires that the fact-finder must necessarily have a reasonable doubt if he entertains, as reasonable, any factual hypothesis inconsistent with guilt."[3] "[T]he jury must exclude every reasonable hypothesis of a defendant's innocence before returning a guilty verdict[.]"[4] Recognizing a reasonable doubt instruction "shall in substance tell the jury that they must be satisfied beyond any reasonable chance of mistake."[5]

Thus, the evidence is insufficient for the jury to convict if the evidence does not rule out all reasonable hypotheses of guilt. And, as discussed later, a "reasonable" doubt is a "rational" or "logical" doubt, meaning that the question for the jury is an objective—not subjective—question.

Due Process and Equal Protection Require That the "Reasonable Doubt" Burden Create

an Objective Test

Equal justice, enshrined by the equal protection and due process clauses, requires that all criminal defendants be judged based on the same evidentiary tests. This maxim also requires that the tests be objective, as opposed to subjective. A law that lacks an objective and consistent definition is unconstitutional under the prohibition on unconstitutionally vague laws. The prohibition against vague criminal laws serves two purposes: providing fair notice to defendants and, "more importantly," preventing impermissible delegation of "basic policy matters" to law enforcement, courts, and juries.[6]

These foundational legal principles apply to all laws, including laws that set forth procedural requirements, such as burdens of proof. For, if it were up to each individual juror what the burden of proof was—which would be the case if the burden were a subjective test—then every defendant would face a different, unknown, subjective test of their guilt or innocence, which would be the antithesis of equal justice and due process.

So, what does "beyond a reasonable doubt" mean?

The terms "beyond" and "doubt" are not ambiguous. However, the term "reasonable" can be defined to establish an objective test, where reasonable means rational, or a subjective test, where reasonable means something like "enough to meet your own internal sense of sufficiency to convict."

If the reasonable doubt burden created a subjective test, then it would be hopelessly indeterminate and, therefore, unconstitutionally vague, arbitrary, and unknowable. It would differ for every defendant and every juror. And it would delegate the question of what the law is to the jury. Of course, the jury is the finder of *fact*, not the authority on the law.

In *L. Cohen Grocery*, for example, the Supreme Court struck down as unconstitutionally vague a law that criminalized any merchant charging an "unreasonable" price for any necessary good.[7] Determining what price is "reasonable" was a purely subjective question, and the law was, therefore, unconstitutionally vague because it failed to "fix . . . an ascertainable standard of guilt."[8]

More recently, the Supreme Court reiterated that criminal laws must provide "a principled and objective standard" for determining a defendant's guilt to overcome a due process unconstitutional vagueness challenge.[9]

Just as the criminal statute in *L. Cohen Grocery* was unconstitutionally vague for making a defendant's guilt turn on a

jury's subjective determination of a "reasonable" price, a burden of proof that turned on a jury's view of whether the proof of guilt was subjectively high enough that the jury felt comfortable convicting would be unconstitutionally vague.

To overcome this vagueness problem, "reasonable" doubt must create an objective test. And the objective definition of "reasonable" is that it means rational or logical. Thus, under the due process and equal protection clauses of the U.S. Constitution, the term "reasonable doubt" must establish an objective test, that is, "rational" or "logical" doubt.

The origins of the requirement that the prosecution must establish its case for guilt beyond a reasonable doubt also show that it was established for the purpose of creating an objective test.

The Historical Origin of the Beyond a Reasonable Doubt Standard Supports That Reasonable Doubt Means Rational or Logical Doubt

The beyond a reasonable doubt test was created as "a protection not for criminal defendants, but rather for the 'souls of the jurors.'"[10] By applying this objective test, jurors were absolved of personal responsibility for the results of their verdicts—for it was the law that convicted (and punished) the defendant, not the jurors or the judge.

Trials of criminal accusations were originally decided by "ordeal"—a non-evidence-based procedure designed to reveal "the judgment of God."[11] The typical ordeal procedures were "cold water" or "hot iron."[12] The cold-water ordeal involved submerging the accused in a body of cold water. If the person floated, they were deemed guilty; if they sank, they were deemed innocent (but often drowned in the process).[13] The hot-iron ordeal required the accused to carry a piece of red-hot iron. Their hands were checked three days later.[14] If the wound festered, they were guilty; if not, then innocent.[15]

In 1215, the church prohibited priests from participating in ordeals because the stain of blood was intolerable and could result in eternal damnation.[16] In continental Europe, this prohibition resulted in the development of the "inquisitional" process, which, although notorious, was at least based on evidence (albeit often confessions produced through torture).[17] By replacing the judgment of God with testimony of witnesses and decisions by judges, the

threat of eternal damnation for wrongful convictions now rested squarely on the shoulders of the participants in the process.[18] Thus, the beginnings of the beyond a reasonable doubt burden of proof arose in order to shift moral responsibility from people involved in the inquisitions to the law itself. Specifically, as early as the 13th century, the inquisitional process required convictions to rests on "proofs that did not permit of any doubt."[19]

In England, the prohibition on ordeals led to the formulation of the jury process.[20] Like the inquisitional judges, these juries feared eternal damnation from incorrect verdicts, particularly when those verdicts resulted in the death of the convict.[21]

This concern for the souls of the jurors was alleviated in England for a few centuries by three procedural devices. First, juries were permitted to enter "special verdicts" in which they found only facts and required the judge to issue the ultimate sentence.[22] Second, the convict was often afforded a clemency process by being afforded "the benefit of the clergy,"[23] which was a fictitious device that bestowed temporary clergy status on a convict so as to spare them from death. And third, transportation to the American colonies was often imposed as a punishment instead of death.[24]

The first two mechanisms for alleviating these moral (and mortal) fears of jurors were mostly removed by the Stuart and Tudor monarchies, around the time of the Star Chamber.[25] And when the American colonies revolted, transportation of convicts was no longer available for some time.[26]

It was at that moment in history—when convictions again consistently resulted in the death of the defendants—that the beyond a reasonable doubt burden of proof emerged in English criminal cases. Scholars have located the first of such cases in the mid-1780s.

For example, the record of the proceedings in the court of the Old Bailey in London for the murder trial of defendant Joseph Rickards, accused and ultimately found guilty of killing his master, Walter Horseman, is the jury instruction: "If you are satisfied, Gentlemen, upon the whole, that he is guilty, you will find him so; *if you see any reasonable doubt, you will acquit him*."[27] And in the pronouncement of the judgment, it was stated, "Prisoner, you have been convicted, upon evidence which *excludes all possibility of doubt*, of a crime . . . ."[28]

Similarly, in the 1783 trial of John Higginson for theft of bank notes from the mail, the judge instructed the jury:

> [T]he true question for your consideration is, whether

judging of this fact, as you judge of all other facts, that happen in the course of your dealings with mankind, and your correspondence with one another, it appears to you be proved satisfactorily, and to moral demonstration, that this prisoner must have been the person that secreted this letter, and took these notes out of it, if that be the fair result of this evidence, then the prisoner is guilty, and it will be your duty to find him so.

If on viewing the evidence *any reasonable doubt remains* on your minds, that he is the person that secreted this letter, and took the notes out of it, he will be entitled to your acquittal. The public justice of the country is extremely considered, on the one hand, if the charge is fairly brought home to the prisoner, that justice should be done upon him; while on the other hand, if there remains any distant hope of his innocence, he should have the same justice by being found not guilty.[29]

Importantly, for our purposes, the following instruction was provided in the 1784 trial of Richard Corbett for arson:

> [I]f there be *any reasonable chance of his innocence*, would be a thought shocking to humanity [to convict him (and subject him to the required punishment)]. * * * [N]o certain conclusion can be drawn in this case, unless you think the conduct of the boy is such as to exclude all possibility of innocence. But you gentlemen will weigh all these circumstances in your minds, in such a case you certainly will not convict the prisoner on a mere suspicion; *but if you think his conduct . . . can by no possibility be accounted for consistent with his innocence, you will be obliged to find him guilty; I do not mean to say that you are to strain against all evidence, or that if you are clearly and truly convinced of his guilt in your own minds you ought to acquit him, but I say if there is a reasonable doubt, in that case that doubt ought to decide in favour of the prisoner*.[30]

Around this same time, the phrase "rational doubt" was often substituted for "reasonable doubt." For example:

> [I]f, in the result of the enquiry, you should entertain any rational doubts, you will be advised (and I am sure will readily adopt the advice), to give the prisoner the benefit of it; but if, on the other hand, they should form such a body of

> circumstantial proof, as that no reasonable man in the place, in which you are now assembled, or in any other, can entertain any *rational doubt* upon the subject; it is then your bounden duty, which I am sure you will discharge, though not with equal pleasure, it will be your duty to pronounce a verdict of guilty.[31]
>
> [O]ur province, as you know, is merely to decide upon the important question of fact; if we prove the facts as I have stated them, you will discharge your duty with the firmness of men, and find him guilty; if you have any possible doubt, if the excellent character I have already attributed to him, and which I have no doubt may be manifested to you by the most respectable members of society, if all this can induce you to entertain a *rational doubt*, you will give him all the benefit of that doubt, and with greater pleasure pronounce that he is not guilty.[32]

This history shows that the question of whether the prosecution has met its burden of proof is not a subjective question of whether each individual juror's internal conception of "sufficient evidence to convict" has been met. Instead, it shows that the test was designed to ensure that the jurors applied an objective test that removed moral responsibility for the decision to convict from themselves and placed that responsibility on the law itself. This mechanism allowed jurors to avoid eternal damnation if they wrongly convicted the accused. And this goal would be accomplished only through application of an objective standard where reasonable means "rational" or "logical."

* * *

Thus, under both the constitutional provisions of equal protection and due process, and based on a historical understanding of the origin of the beyond a reasonable doubt burden of proof, the question for a criminal jury is whether the prosecution has ruled out all rational or logical "doubts"—that is, all rational alternative explanations other than the defendant is guilty.

Defense Counsel Can Argue That Rational Alternative Explanations Could Explain the Evidence, Even If No Affirmative Evidence

Supports Those Alternatives

Having established that reasonable doubt is an objective test, which requires the prosecution to rule out the rational or logical alternative explanations for the evidence other than the defendant's guilt, the question becomes whether defendants may suggest rational or logical alternatives even if there is no affirmative evidence to support these alternatives.

For example, in a case involving a murder occurring in North Carolina where the only evidence of the defendant's guilt is an eyewitness who says they saw the defendant kill the deceased, can the defendant's counsel argue in closing that the defendant *might have been* in Alaska, even if no evidence remotely suggested that the defendant was in Alaska?

As discussed next, the law allows defense counsel to suggest (and the Constitution prohibits courts from barring defense counsel from suggesting) that the defendant *might have been* in Alaska because no evidence ruled out that possibility. On the other hand, defense counsel can be prohibited from arguing that the defendant *was* in Alaska. The former is a rhetorical device used to illustrate the failure of the prosecution to prove beyond a reasonable doubt that the defendant was present at the scene of the crime—because the evidence left open the rational possibility that the defendant might have been in Alaska. The latter argument—that the defendant *was* in Alaska—would be the impermissible argument of facts not in evidence.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[33] This right necessarily includes the right to present argument that persuasively highlights the prosecution's failure of proof.

> [I]n the American tradition a closing argument can be a quintessential example of the art of persuasion. That tradition is a great one, and courts should be cautious about imposing too stringent restrictions. Few human endeavors are more fraught with difficulty than persuading another person of the rightness of one's view, particularly when time or space is limited. Finding the perfect note to ring is a product of reflection, insight, empathy, and luck. Justice will not be served if we are too quick to constrain the imagination of litigators.[34]

Moreover, "prosecutors must refrain from making burden-shifting arguments which suggest that the defendant has an obligation to produce any evidence or to prove innocence."[35] For example, as the D.C. Circuit explained, "defense attorneys must be permitted to argue all reasonable inferences from the facts in the record. . . . This includes the 'negative inferences' that may arise when a party fails to call an important witness at trial, or fails to produce relevant documents or other evidence, and it is shown that the party has some special ability to produce such witness or other evidence."[36] "One basic principle of our criminal justice system which the jury must be told is that the State is required to prove the defendant's guilt beyond a reasonable doubt. . . . A corollary of this principle which the jury also must be told is that reasonable doubt may arise solely from a lack of evidence presented by the prosecution."[37]

However, "the attorney may not use the absence of . . . evidence as a springboard for arguing facts not in evidence."[38]

The difference between the rhetorical device of suggesting alternatives that *may have* occurred, on the one hand, and arguing that alternative explanations *did* occur, on the other, comes down to how the argument is framed for the jury. So long as defense counsel makes clear that they are using the suggested alternative explanation to illustrate that the prosecution has failed to present sufficient evidence to convict—because that evidence fails to rule out other rational explanations for the evidence—the argument is not only proper, but also constitutionally protected under the Sixth and 14th Amendments.

The State Must Rule Out Every Reasonable Doubt (Every Contrary Rational Alternative) as to the Existence of Every Fact Necessary to Show the Defendant's Guilt

In 1970, the Supreme Court wrote:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged.[39]

Thus, it is the state's burden to prove each essential element beyond a reasonable doubt. This means that a defendant's suggested rational alternative explanations need not explain the entirety of the offense but can be used to undermine any essential fact (i.e., element) of the offense.

The factual reasonable doubt test for the jury must not be confused with the legal test for sufficiency of the evidence applied by the judge.

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[40]

> "[A]lthough the jury is required to exclude *every* reasonable hypothesis of a defendant's innocence before returning a guilty verdict, [courts] must affirm the jury's finding if there is *any* reasonable hypothesis that supports the conviction."[41]

Thus, while the Rule-Out method applies to *jury* determinations, it does not apply to judicial review of those decisions. Defense counsel should be prepared to highlight this difference between these two standards, because there is a great deal of case law stating that the legal test for sufficiency of the evidence that judges are to apply does not require that the prosecution rule out all reasonable alternative explanations.

* * *

In sum, the beyond a reasonable doubt burden of proof creates an objective test. To meet it, the prosecutor must rule out all reasonable hypotheses that support the defendant's innocence. Under the Constitution, defense counsel cannot be prohibited from suggesting that the evidence is consistent with certain alternative explanations, even if the evidence does not affirmatively support those explanations—so long as defense counsel makes clear that

such an argument is being used as a rhetorical device to illustrate the prosecution's failure to meet their burden of proof. And defense counsel must be careful to make sure courts do not inappropriately conflate the sufficiency of the evidence test applied to review of jury decisions with the beyond a reasonable doubt test that juries must apply.

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1. State v. Adcock, 310 N.C. 1, 28 (1984); Thomas v. Commonwealth, 187 Va. 265, 272, 46 S.E.2d 388, 391 (1948).

2. Quoting McBride v. Commonwealth, 30 S.E. 454, 457 (1898); State v. Glenner, 513 A.2d 1361, 1364 (Me. 1986).

3. State v. Smith, 800 N.W.2d 957 (Wis. Ct. App. 2011).

4. *Cf.* United States v. Austin-Bagley Corp., 31 F.2d 229, 234 (2d Cir. 1929).

5. Courts abroad recognize that if the jury considers that there is any reasonable explanation of those circumstances that is consistent with the innocence of the accused, they must find them not guilty. *See* R v. Hodge (1838) 2 Lewin 227; Mannella v. R [2010] VSCA 357; Knight v. R (1992) 175 CLR 495; Shepherd v. The Queen (1990) 170 CLR 573; Chamberlain v. R (No 2) (1984) 153 CLR 521; Barca v. R (1975) 133 CLR 82; Plomp v. R (1963) 110 CLR 234; Thomas v. R (1960) 102 CLR 584. *See also* Shepherd v. The Queen (1990) 170 CLR 573 (The inference drawn by the jury must be the only reasonable inference which can be drawn from the facts.); Chamberlain v. R (No 2) (1984) 153 CLR 521 (same). *See also* Martin v. Osborne (1936) 55 CLR 367 (recognizing that the existence of a particular fact-in-issue will be the only rational inference to be drawn from circumstantial evidence if according to the common course of human affairs, there is such a high probability that the occurrence of those circumstances would be accompanied by the existence of that fact-in-issue that the contrary cannot reasonably be supposed); Plomp v. R (1963) 110 CLR 234 (same); R v. Taouk [2005] NSWCCA 155 (same).

6. Kolender v. Lawson, 461 U.S. 352, 358 (1983).

7. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

8. *Id.*

9. Johnson v. United States, 576 U.S. 591, 598 (2015).

10. Thomas P. Gallanis, Reasonable Doubt and the History of the Criminal Trial, *Univ. Chi. L. Rev.* 76, 2009, pp. 941, 942 (quoting James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, 2008, p. 3).

11. *Id.* at 944–45.

12. *Id.* at 945.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 945–46.

18. *Id.* at 946.

19. *Id.* (quoting Whitman, *supra* note 10, at 115).

20. *Id.*

21. *Id.* at 946–47.

22. *Id.* at 947.

23. *Id.*

24. *Id.* at 948.

25. *Id.*

26. *Id.* at 949.

27. Trial of Joseph Rickards (t17860222-1), *The Proceedings of the Old Bailey* (Feb. 22, 1786), https://www.oldbaileyonline.org/browse.jsp?div=t17860222-1 (last visited Dec. 7, 2023) (emphasis added).

28. *Id.* (emphasis added).

29. Trial of John Higginson (t17830430-67), *The Proceedings of the Old Bailey* (Apr. 30, 1783), https://www.oldbaileyonline.org/browse.jsp?div=t17830430-67 (last visited Dec. 7, 2023) (emphasis added).

30. Trial of Richard Corbett (t17840707-10), *The Proceedings of the Old Bailey* (July 7, 1784), https://www.oldbaileyonline.org/browse.jsp?div=t17840707-10 (last visited Dec. 7, 2023) (emphasis added).

31. Trial of Thomas Kemp (t17960113-40), *The Proceedings of the Old Bailey* (Jan. 13, 1796), https://www.oldbaileyonline.org/browse.jsp?div=t17960113-40 (last visited Dec. 7, 2023) (emphasis added).

32. Trial of Robert Aslett (t18030706-34), *The Proceedings of the Old Bailey* (July 6, 1803), https://www.oldbaileyonline.org/browse.jsp?div=t18030706-34 (last visited Dec. 7, 2023) (emphasis added).

33. Holmes v. South Carolina, 547 U.S. 319, 319 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

34. United States v. Gregory, 54 F.4th 1183, 1209–10 (10th Cir. 2022), *cert. denied*, No. 22-905, 2023 WL 2959422 (U.S. Apr. 17, 2023). Therefore, courts must allow lawyers to make rational, logical arguments that are supported by the evidence.

35. United States v. Simon, 964 F.2d 1082, 1086 (11th Cir. 1992) (citing *In re* Winship, 397 U.S. 358, 364 (1970)); Sweeting v. State, 260 So. 520, 525–26 (Fla. 3d Dist. Ct. App. 2018) (holding prosecutor's comments during closing argument improperly shifted the state's burden of proof onto the defendant).

36. United States v. Hoffman, 964 F.2d 21, 24 (D.C. Cir. 1992) (citing United States v. Pitts, 918 F.2d 197, 199–200 (D.C. Cir. 1990); Edward W. Cleary, *McCormick on Evidence* § 272 (1984)); State v. Jones, 224 N.J. Super. 527, 530 (App. Div. 1988).

37. Citing State v. Ingenito, 87 N.J. 204, 214 (1981); State v. Hudson, 38 N.J. 364, 374–79 (1962); State v. Walker, 33 N.J. 580, 594–95 (1960); State v. DePaola, 5 N.J. 1, 8–9 (1950).

38. *Hoffman*, 964 F.2d at 26.

39. *In re* Winship, 397 U.S. at 364 (emphasis added).

40. Jackson v. Virginia, 443 U.S. 308, 318–19 (1979) (quoting Woodby

v. INS, 385 U.S. 276, 282 (1966)) (emphasis added).

41. State v. Hauk, 257 Wis. 2d 579, 588, 652 N.W.2d 393, 397 (2002) (citing State v. Blair, 164 Wis. 2d 64, 68 n.1, 473 N.W.2d 566 (Ct. App. 1991)).

Part 2

Rule Out in Practice

Part 2 covers ways to apply the principles of Rule Out in trial. You can use them as described and as guidance for developing your own.

Caution: Without understanding the principles in Part 1, do not use anything in Part 2.

Chapter 8

Voir Dire

Pointers and Suggested Questions

This section assumes you already know how to conduct a fruitful voir dire. If not, or if you want to improve, there's no shortage of good workshops, books, webinars, and seminars.[1]

- Try to determine in advance your judge's usual voir-dire practices, including their standards for granting cause challenges and allowing rehabilitation of prospective jurors. Be certain you know and have written memoranda about *all* your voir-dire law, including the limits of the judge's discretion.
- Have alternative ways prepared to ask whatever questions the judge won't allow.
- Move for voir-dire improvements, such as
  - More time for questioning
  - Pre-voir-dire written questionnaires beyond the standard court-issued generic
  - Attorney questioning, or at least follow-up
- Check that nothing in any court-issued jury pamphlet or video can create wrong impressions about voir dire or trial—such as "Trials are a search for truth."
- Know how and when to make Batson-type challenges. Make them even when your courts rarely uphold them. During voir dire, track each prospective's answers so you can demonstrate that the state improperly struck a protected-class prospective who said the same as one the state did not strike. *And challenge the state's first apparent violation.* Win or

lose, that first challenge often discourages more transgressions.

• 10 percent rule. During voir dire, *do a maximum of 10 percent of the talking*. Leave the other 90 percent for the prospectives. When you talk more than 10 percent, you're doing it wrong. It compromises rapport, makes prospectives reluctant to talk much, and results in less information from them.

• Hands empty! No pens, notepads, or clipboards. Have someone at your table take notes, not you. Prospectives tend to be less frank and forthcoming when their questioner is writing down their answers.

• Don't stand behind a lectern. Lecterns hate you. Return the sentiment. If you're forced to stand behind one, lower it to block as little of you as possible. Sneak around it when you can. At all times, you want as little between you and the jurors as possible. Lecterns are tools of the devil. The one good use for a lectern is to hold your notes *next* to you. Other than that, there ought to be a law against lecterns. Hannibal Lecter invented them.

• Don't use legalese or anything that sounds like it in voir dire or anywhere else in trial.

• Never argue with or "correct" a prospective juror.

• Save your voir-dire notes and transcribe those of the seated jurors for your review every morning before trial. The more you remind yourself about each juror, the more you'll relate to them during trial.

• Focus groups are a uniquely rich source of guidance for knowing what to ask and how to evaluate the responses. Focus groups need not be expensive or elaborate. See p. 165.

• Some—not all—trial consultants are invaluable for voir-dire preparation and response evaluation guidance. Because Rule Out might be new to them, be sure they fully understand it before they start work. (Note that in at least one state—West Virginia—failure to use a trial consultant can constitute ineffective assistance.)

Rehearsal

The evening before voir dire, do a practice voir dire of four or five people you don't know. This has many values, not the least of which lies in letting you start your real voir dire the next day relaxed and focused—which gets you more information from jurors and creates

better rapport with them.

Short Voir Dire

Trial consultant—and contributor to this book—Artemis Malekpour advises that when questioning time is limited, speeding through too many questions yields superficial answers of little value. You'll do better by asking only as many questions as you'll have time for prospectives to answer thoroughly.

How to Ask[2]

Questions jurors can answer yes or no, or with any other word or two, don't help much. "Do you think you can follow the law about reasonable doubt?" is ineffective to the point of being silly. Instead, start each topic with the "some people or other people" question. Here's the template:

> Some folks believe X. Other folks believe Y. Who here is closer to the folks who believe X, even by a little? And closer to folks who think Y? Who's in the middle? [*Ms. Reynolds, what about you? I did not see your hand.*]

So, for example:

> When a person is certain their memory about something is accurate, some folks think the memory is probably accurate. Other folks say no, being certain does not make it accurate. Which are you closer to, even by a little?

Some judges resist this form of question. You might overcome their resistance by explaining that it makes jurors more comfortable in answering honestly because it makes them feel they have company no matter which way they answer. When the judge won't budge, ask the question in a more traditional way, such as "How many of you trust someone else's memory just because the person is sure of it?" But don't fall back on this unless you have to.

Other examples:

> Some folks think being under oath or affirmation makes people more honest. Other folks think that there's no way to know, these days.

> Some folks think that people who've been arrested and

brought to trial are likely guilty. Other folks disagree.

Most of the following questions are framed in the same way.

However you ask, follow up the answer. You don't learn much that's reliable from any first response. The all-purpose follow-up question is "*Tell me about that.*" Don't specify a particular topic, such as "Does feeling X mean you'll ___?" Leave the prospective free to choose whatever is most relevant to *them* about the topic. Lead them into a particular topic you need to hear about only when they don't get there on their own in response to your "Tell me about that," "Tell me more about that," and so on.

Some questions need an introductory sentence or two, such as:

> *In cases like this, jurors can convict only when the prosecutor has ruled out every reasonable doubt. A reasonable doubt about even one fact the prosecutor must prove means the jury cannot acquit.* So here's my question: Some folks are OK with that. Others think it's too hard on the prosecutor. Who are you closer to? The folks who . . .

It's also useful to include a permission point: something that makes the prospectives extra comfortable in giving you the bad answer. Long before serving as a U.S. senator, the brilliant North Carolina plaintiff's personal injury attorney John Edwards taught me this permission point: "My own *mother* thinks money for pain and suffering serves no purpose because it does not make the pain go away." This makes prospectives at ease with giving that bad answer, which John needed to know for purposes of selection. Your goal is always to lower the obstacles to the bad answer, and getting bad answers is your most important voir-dire task.

Know your judge. Nowhere in trial does trial law and practice vary among venues more than it does in voir dire. For one of many examples, questions that are freely allowed in one venue might not be in others. There's often wide variance even among judges within the same venue. Try to find out what your particular judge is likely to have problems with. And don't be afraid to make well-supported motions *in advance* to be allowed to use questions the judge usually bars. Don't rely on judges to move off their customary base once voir dire is underway. Give them time in advance to consider your argument and support.

Sometimes a judge's resistance comes from some particular wording or phrase, so be prepared with alternatives. A judge might also resist the full question. Create or find an alternative that accomplishes the same or close to the same thing.

Don't prepare for voir dire in isolation. Many other defense lawyers have likely been in the same judge's courtroom; they can tell you what to expect from that judge.

Rule Out's Voir-Dire Questions

Select the most case-relevant questions that follow to fit the allotted time. Never omit the reasonable doubt and third and fourth jurors' rights questions.

You may have to adapt some of the following questions to conform with local law.

The more important questions that follow are asterisked, with multiple asterisks for the most important.

Also, note that real-life examples will help jurors understand your questions and be more forthcoming.

Note that the suggested questions are just skeletons. Adapt the wording to comfortably suit your own personal style but maintain the question's substance.

First Question: Innocence

> ***I'm John's attorney. But I'm not here to prove he's innocent. How many of you are surprised that I'm not here to prove innocence? Who was not surprised?
>
> Mr. _____, please tell me about that.
>
> After they all have their say, ask:
>
> I asked you that question because in cases like this, jurors have no way to decide innocence. It's not on the verdict form. It's not your job. Instead, you decide whether there are any reasonable doubts. Some folks are OK with that. Other folks think it's more important to decide between guilt and innocence.

Final Questions in Voir Dire: Jurors' Rights[3]

When pressed for time, you can omit the first and second jurors' rights questions.

> 1. As jurors, you'll have some important rights. First, you'll have the right to hear all the testimony. So if there's anything

a witness says that you don't hear, will you be willing to raise your hand and ask the judge to have the witness repeat what they said?

2. You'll also have the right to know the law the judge will give you. So in deliberations, if there's anything you don't remember about the law or if there's any disagreement about the law, will you be willing to ask your foreperson to reread the law? [Or, Would you be willing to ask your foreperson to knock on the door and tell the bailiff you need to hear a part of the law again?]

3. ***The third is your most important right. You have the right to go home, after trial ends, knowing that the jury you were on stayed inside the law in coming to its decisions. *No one has the right to disrespect you by asking you to violate your oath or affirmation by doing anything that steps outside the law.* No one will have the right to bully you, try to force you, strongarm you, or even ask you to step outside the law. So during deliberations, if anyone disrespects you by doing that —such as by trying to get you to convict in spite of a reasonable doubt you have—will you let the judge know about it?

4. Fourth, other jurors will have the right to expect you to respect their rights to make their decisions on the basis of what they truly believe, the same right that you have. Everyone OK with doing that?

You need not follow up the jurors' rights questions.

Insert the remaining questions into the template (given earlier) as appropriate. Remember to follow up.

Reasonable Doubt

*** Some folks think that making the prosecutor rule out every reasonable doubt is too hard on the prosecutor. Other folks are OK with it. Which folks are you closer to?

We'll have 12 different jurors because everyone is different. Everyone walks through life in their own shoes, has their own thoughts, their own attitudes, makes their own decisions. Some people find that that's extremely important for them: "Let me see things the way I want to." Other folks have an easier time going along with what other people think, so they conform to prevent arguments and conflicts. Which are you closer to?

Reasonable Doubt

**A reasonable doubt is a logical doubt about anything the prosecutor must prove. Here's an example, not from this case:

- Let's say that a crime was committed in Boston.
- The jury cannot convict unless the prosecutor has enough evidence to logically rule out that maybe—even just maybe—the defendant was not in Boston.

Some folks think that's the way it should be. Other folks think the defendant should have to *prove* he was not in Boston. Which are you closer to?

Respect for Government

In cases like this, the government is the accuser. The prosecutor speaks for the government. Some folks tend to trust what the government says. Other folks want the government to prove it's right. Which are you closer to?

Control the Government

Being a juror is one of the last ways an individual citizen can, all by themselves, keep the government from making a mistake or doing something wrong. Some folks are OK being in this important position, even if it means telling the government they cannot convict. Other folks don't feel qualified or experienced enough to say no to the government, so it should be up to the police and the prosecutors because they're the professionals. Which are you closer to?

Arrested = Probably Guilty?

Some folks think that someone who's put on trial is probably guilty, or why would the government take the time and expense of bringing them to trial? Other folks say no, wait a minute, the government makes mistakes like anyone else. Which way do you lean?

Assumption of Wrongdoing

I once was certain that my best friend had stolen my wallet. I felt really bad later when I found out he had not. How many of you have ever had this kind of experience? Who else do you know that it's happened to?

Have people ever been certain you did something wrong that you did not do? (I won't ask what it was unless you volunteer it.)

High Stakes. This is important because mistrust of complete strangers applies mostly to high-stakes situations. (See p. 60.)

Note: Some folks believe that the stakes are very high in every case, so they feel great responsibility to follow the laws—the jury instructions—such as the law about reasonable doubt that says you must not convict when you have a reasonable doubt about anything the prosecution has to prove. Other folks don't think these kinds of cases are really all that important.

This kind of question illustrates the importance of follow-up questions. Most jurors will say that these cases are important, but follow-ups will help show which ones mean it.

Complete Strangers

**My father always thought he could tell when anyone, even a complete stranger, was telling the truth. "I know when someone is telling the truth." But some folks don't think they can ever be sure about that. They think, "You never know." Are you closer to folks like my father, who thinks he could always tell when someone was telling the truth? Or closer to folks who think you never really know, because anyone could be mistaken or dishonest, no matter how they seem—*especially* complete strangers?

Multiple Agreeing Witnesses

**Some folks think that when two or three or more people agree about what they saw, they must all be right beyond reasonable doubt. Other folks say not so fast, several people can all be wrong about the same thing. Which are you closer to?

Defendant Not Testifying

*In wording this question, be careful not to give the impression that your defendant won't testify. The strength of the bias involved—"anyone not guilty would insist on testifying"—can tilt jurors against you right from the start. But when jurors don't find out until later in the case, the bias is far weaker. (Unless you reveal it in advance, jurors don't know it until you rest your case.) So in voir dire, ask about it without spilling the beans.

**I automatically have to ask this next question in every case. The United States Constitution says defendants don't have to testify. Some folks—my own mother, for example—think anyone who's not guilty would be eager to tell their side of the story. Other folks think people can have good

reasons for not testifying, so not testifying does not make guilt more likely. [*You might want to add examples, e.g., someone innocent might not testify because they'd have to say something that would hurt someone else—a friend or relative.*] Which folks are you closer to?

Paid Experts

In trials, some witnesses cannot be paid for testifying. But some professionals are paid to testify, or testify as part of their regular jobs. Some folks feel that all else being equal, it's harder to trust paid witnesses than to trust those who testify for free. Other folks think it makes no difference.

Logic

**Jurors can convict only on the basis of logic, not feelings or guessing or hunches or "I don't know how I know, I just know." The law says to use logic *only*. Some folks have trouble keeping emotion and intuition and feelings out of their decision-making. Others are OK using nothing but logic. Which are you closer to?

Weighing in the Balance?

The prosecutor needs enough evidence to rule out every reasonable doubt about every point they're required to prove. This is OK with some folks. Other folks prefer to weigh things in the balance, so they don't insist that every one of the reasonable doubts has to be ruled out. Which folks are you closer to?

Science/Forensics

*You'll hear some forensic testimony, such as _____. Some folks have complete confidence in forensic science. To other folks, it depends. Which are you closer to?

Reasonable Doubts in Life

You need one or more of these questions when a jury instruction tells jurors to apply the same level of certainty in deciding their verdict as they do when making the most important decisions in their own lives.

Some folks have made some decisions in their own lives beyond reasonable doubts. Other folks think no, there are always reasonable doubts, you never know.

Some folks have beyond-reasonable-doubt religious beliefs. Aside from religious beliefs, which of your beliefs are beyond reasonable doubt?

What important decisions have you made even though you had some reasonable doubts?

Size, Weight

**Some folks think a small amount of reasonable doubt should *not* acquit. Other folks disagree; they think a small reasonable doubt is still not beyond reasonable doubt, so they *should* acquit. Which are you closer to, even by a little?

Instead, if allowed, ask the Tylenol questions.[4]

The Tylenol questions detect prospectives unlikely to consider small reasonable doubts and help show jurors that they already use small reasonable doubts when making high-stakes decisions.

You'll need several Tylenol-type bottles. The smallest would hold 25 capsules, then a 50-capsule bottle, 225, 500, 1500, and one *far* larger, like a two-gallon jar. In some venues you can't use props in voir dire, so omit the bottles when necessary but still ask the question. It works without them. But do use the bottles in closing.

In voir dire, explain the Tylenol murders:

In 1982, someone put a poison—cyanide—into one of the capsules in a number of Tylenol bottles, recapped the bottles, and put them back on the shelf. By the time this was discovered and the bottles removed, seven people had taken the capsules from different bottles and the cyanide killed them.

This little bottle holds 25 Tylenol. Let's say that maybe—just *maybe*—one of its capsules *might* contain some of that cyanide. Raise your hand, please, if that's a small enough risk for you to buy this bottle for your family medicine chest. Anyone?

No one will, except maybe jokingly. No need to follow up the Tylenol questions unless a juror gives an unexpected response.

Now show the 50-capsule-sized bottle.

This one holds 50. One of its capsules might contain cyanide. Maybe none, maybe one. Small enough gamble to buy the bottle?

This one? One maybe in 225. Is that a small enough gamble for you and your family?

This one? One in 500?

This one probably holds 1500. A very small gamble. Is it small enough? Who'd buy it and take one for a headache?

Now the largest:

One in a few thousand. Some folks are OK with a gamble that small. Others would say no, there's still reasonable doubt about that bottle. Which are you closer to?

How many would you want in a bottle to make the gamble small enough?

Your answers tell you how small a reasonable doubt can be and still count.

Reprise the Tylenol analogy in closing; remind them of their answers.

Some judges won't allow you to mention the number of capsules in each bottle—it can be seen as quantification of beyond reasonable doubt. In that situation, refer to the bottles as very small, small, a little bigger, and so on.

See pp. 73–76 for voir-dire help with particularly bad (i.e., burden-lowering) reasonable-doubt instructions in your venue.

Another suggestion for illustrating the fact that even a very small reasonable doubt counts:[5]

Folks, I have two little girls. They are the most precious thing in the world to me. And if you ask me what is THE most important decision I have ever made, it's the decision whether to tell them it's safe for them to cross a busy street.

That's what I think of as THE most important of my own affairs. What's yours?

Cause Dismissal Method

In Florida, when a prospective juror says anything disqualifying, the judge disqualifies them. Clarification is allowed but not rehabilitation. Virginia has limits on what constitutes permissible rehabilitation. But most places allow rehabilitation without limitations. The most common kind of rehabilitation is to get the prospective merely to say they'll follow the law, even though it's obvious that many of them won't. In fact, the judge is often the only one in the room who believes it. Everyone else knows better. Some jurors even say that the judge is at best naïve, or unfair, biased, or not very bright. This seriously diminishes respect for the judge and

for the justice system—and you still have to deal with losing those cause challenges.

Your best chance is to use some particular, consistent method of questioning the prospective that's adapted to the law and the practices of the particular judge. Winging it sometimes works but too often fails.

Here's a template for one such method.

Get the prospective juror to say everything they have to say about why they will have trouble following the law. "Tell us more about that," several times. The more you get them to say, the better, because many judges have been taught to base cause decisions largely on the totality of what the prospective says.

1. Switch to these leading questions:
    a. I can tell you know your own mind and that you feel strongly about this. So if I tell you you'd have to forget about it to be a juror in this case, I'm correct, aren't I, that you'd have trouble forgetting about it?
    b. How about if Mr. Prosecutor told you that you'd have to set it aside?
    c. And you seem to be firm enough about this that even if the judge said you'd have to set it aside in order to follow the law, you would not be likely to?
    d. Or if the judge asks if you will follow the law anyway? That would still be hard without giving up something you really believe?

In this method, you conduct the rehabilitation yourself, and you get strong, clear answers that the prospective will have difficulty credibly reversing when the state and the judge later try to rehabilitate and that will make for a stronger appeal issue.

In supporting your cause challenge, include the key phrases from cases on jury selection. For example, the first holding of *Wainright v. Witt*, 469 U.S. 412 (1985), says that the standard for a cause is anything that would "prevent or substantially impair" a juror from following the law and that the substantial impairment does not have to be shown with "unmistakable clarity." Collect as many such phrases and their sources as you can find, and use as needed.

Voir Dire Demonstration

By Emilia Beskind

When Emilia Beskind (Chapel Hill, NC) was a New Orleans public

defender some years ago, she and others in her office were among the first to apply Rule-Out methods, substantially overhauling their won/lost records. The following partial transcript illustrates some ways she uses Rule Out in voir dire.

Rule Out's first version taught lawyers to ask prospective jurors about their ability to spot lies. This is demonstrated later. But ongoing study, along with examples like the one that follows, showed the need for an adjustment. You'll now find it more useful to ask prospectives whether they believe they can tell for sure when someone is *not* lying.

As you read, pay particular attention to Emilia's reasonable-doubt questioning in the second half of the transcript. Her questioning quickly divides the prospectives into good and bad. If you could ask only one question, this one would usually be the best choice.

Note that some of the prospectives' responses are included (italics).

* * *

How can you tell whether or not a stranger is lying to you? I have a friend who says she is good at this. I have another friend who says she can never tell. Where do you put yourself between these two people? I can basically tell when a stranger is lying to me? Or, I cannot?

Someone who can tell?

Someone who can't tell?

Do we have anyone who can't tell whether people are lying to her?

We have a journalist who has some experience that helps her decide if a stranger is lying.

Do we have anyone else who can tell or not tell if someone is lying if I don't know them?

Telltale signs. Tell me a little more about that.

Is there anybody who disagrees with those signs?

Tell me which side you are closer to—people can tell who is lying or nobody can tell.

Juror 6: I believe I am a little in between because there is so many factors to it. Um, I know they say, like body language, but so many people have control of their body language.

So between the two people you would say you are in the middle.

What do *you* think? Do you put yourself closer to one side or the other?

Juror 5: I think I am probably pretty good at telling when someone is telling the truth. I used to be a journalist so that is something you were always on the lookout for. And, people lied to you a lot as a journalist, so you would have to kind of expect it.

So we have someone in the middle and someone who says I feel like through my experience I can kind of tell when someone is lying or telling the truth.

Is anyone on the other side, who thinks you really can't tell when someone is telling the truth or lying?

Juror 1: It's really hard to know if you don't know someone and if you don't have some prior experience. I am very trusting by nature. It would be very hard to tell when someone was lying.

Does anyone else have some experience, like the journalist, who can give them some insight into whether someone's telling the truth?

How about you?

Juror 4: I am probably closer to the first juror that you can't tell if a stranger is lying. But there are telltale signs if someone is not very good at lying.

Telltale signs—tell me a little more about that.

Juror 4: You know body language, stuttering, you know, things like that—the way that they talk or double backing on things.

I saw you nodding. Is that something you agree with?

Juror 6: Yes, some things are like dead giveaways, so you know somebody is lying.

Does anyone disagree with those signs and what that tells you?

Juror 1: It might be hard to tell if someone has a disability. If they are not a neurotypical kind of person. They might be telling you the total truth, but they are just sort of nervous and so . . .

I haven't heard from either of you guys in the back, so which side are you closer to: human lie detector or nobody is?

Juror 3: I don't think anybody would admit to not being able to tell, but I am probably a little closer to the lie detector side. I used to be a forensic accountant, I'm in restaurants now, I deal with people a lot. You hope that people don't lie to you as an accountant or about their sandwiches. But you just kind of figure it out.

Juror 2: I definitely can kind of see through the kind of BS so to speak. I deal with a lot of people on a regular basis. I'm a general contractor so I deal with contractors, vendors, subcontractors. I'm a people person so I have seen people from all different backgrounds, and I see how some work together to try to play good cop bad cop and I just kind of feel like I can see through it pretty easy.

Thank you, I appreciate it.

I want to talk to you about the credibility of someone who is accusing someone else of sexual assault. My mother grew up in a time when women frequently were not believed, so she believes very strongly that a woman would never lie about it. And I have a friend who says it's just like anything else. Are you closer to my mother who says a woman would never lie about it or my friend who says it's just like anything else?

Juror 4: I would be in the middle where someone could lie. Just the way society is now, that you could take advantage, and it may be hard to prove otherwise.

How about on the back row?

Juror 1: I'm definitely on the side of this is something a woman would not lie about. It's not common. And I think that just the process of accusing someone of sexual assault can be pretty traumatic, and I think that not a lot of women are going to put themselves in that position and lie about it if they are then going to have to go through that whole process about it.

When you answered the question I got the sense, and tell me if I am wrong, that this is something you feel pretty

strongly about. Tell me more about that.

Juror 1: I think that, especially in the past recent years, most women can point to a time in their past where they have experienced, if not exactly sexual assault, something unpleasant, and if they start to discuss it they get pushback on it and people feel like they are lying. I think a lot of women understand that you only really say something if it's 100 percent absolutely totally true because it's such a process to get someone to believe you in the first place that you don't want to add to it by lying about it.

I am going to acknowledge you are the first man asked about this question. Are you closer to my mother's side and the juror two down from you?

Juror 3: Probably closer to the other jurors and your mother's side. There are probably some motivations to lie about it sometimes, but I agree that it can be a traumatic thing to put yourself through if it isn't true, nowadays with social media and the visibility online and stuff like that. So I lean to your mother's side.

Does anyone have the other opinion or closer to the other opinion?

Does anyone feel it isn't any different than any other thing?

Juror 6: I'm a little closer to your mom's side too. Not saying that it never happens but generally women don't lie about things like that.

Which side are you closer to?

Juror 5: Yes, I'm a little closer to your mom's side. Not that I believe people don't lie but that would be a lie you would be more hesitant to tell than most other lies.

Finally, in the back row.

Juror 2: You know I don't think it's something to joke about. I think it's a very serious situation and I think the media has really made it very gray. A lot of people have really taken advantage of the situation, whether it be a small sexual assault or a large sexual assault, that it's just become very gray. And I was always brought up to respect women in a certain way, you know, but in

light of how the news has been over the past few years and the kinds of people who have fallen down left and right because of someone coming out of the blue saying he touched me inappropriately ten years ago or whatever and there's no grandfather clause. When does that stop? It never should have started in the first place, but it has to do with women's rights progressing and all people's rights progressing. I don't know if I am answering your question.

This is a really difficult thing to talk about. Can you tell me why you said it's a little gray?

Juror 2: I think the media has made it gray, especially in all these elections and all these people who are supposed to be our heroes on TV and all these sports players and newscasters and stuff getting called out for actions that they did in the past or current and trying to get away with it. I just think that I'm not sure. It's just come to light—it's more prevalent than it used to be. It's not acceptable anymore. Maybe in the past it seemed more acceptable.

We will come back after our next subject.

I want to talk a little bit to you about the burden of proof. And the burden of proof in a criminal case.

It's proof beyond a reasonable doubt. Proof beyond a reasonable doubt is more than 50/50. It's higher than "he most likely did it" or "he most certainly did it."

It's the highest standard in our law. The question is what is a reasonable doubt. It's doubt based on reason and common sense. Let me give you an example.

Who here is old enough to remember back in the 80s there was a time when someone in Chicago was putting a poison pill in bottles of Tylenol? And now it's why we have that annoying plastic wrap.

Back in the 80s when this happened, the truth is it was only one guy in one Tylenol factory in Chicago and he poisoned only a couple of bottles, but Tylenol was recalled and everyone in the country threw out Tylenol. So a reasonable doubt is doubt that is reasonable, so let's put it in that context.

So say this is happening today and you have Tylenol on your shelf.

You have no way to know if that bottle on your shelf

came from that factory, or that he poisoned that bottle, or that, if you reached into the bottle, the pill you pulled out would have poison in it.

Do you think it would be reasonable to throw out that bottle and get a different bottle?

Juror 4: [Nods.]

Why is that a reasonable doubt?

Juror 4: Um, [unintelligible.]

Let's say you have no way of knowing it came from that factory. Is it reasonable to throw out that bottle and get a different bottle?

Juror 4: Yes, I would get a different bottle.

Do you think your odds of having a poison pill in that bottle are medium, low, or high?

Juror 4: Probably low, but, with my luck, it might be.

But it's fair to say that if you get it wrong, the consequences are terrible. Our odds are astonishingly low, worse than winning the lottery, but still it's a reasonable fear and everyone acted reasonably and threw out their bottle to rule out getting a poisoned one.

That's what reasonable doubt is—the *size* of the doubt doesn't matter. Before we take a poison pill or have someone else take a poison pill because of a decision we have made, we want to make sure we have ruled out every reasonable doubt.

Now I want to ask you how you feel about it and what it might mean.

So, I think I saw some wheels turning because all of a sudden, beyond reasonable doubt sounds like a very high standard. And that is what the law asks you to do. I want to ask you how you genuinely feel about that. Some people say that standard is too high, that it risks letting people who really did the bad thing back out on the street—but other people say too many innocent people already go to prison and it should be even higher.

Which side are you closer to: the side that says if you are really making me rule out every reasonable doubt, even if it's very unlikely but reasonable, the standard is too high, or are you on the side that it's better that 100 guilty people go free than that one innocent person goes to jail, that's the right standard?

Juror 2: That's tough, I mean, you are kind of suggesting that, OK, beyond a reasonable doubt, we think it's this one individual, but it could have been one of these other ten. I think there should be further investigation for starters, but, and maybe there's a hierarchy, OK, this is the person we think did do it but there are all these other people in coercion with it. It's not one and done, if there is multiple people that are being looked at.

What about you? Will you have a hard time sending someone home you think might have done it, or is reasonable doubt the right standard?

Juror 6: That is a tough one. I feel like I'm leaning more towards the, so you were saying, with the reasonable doubt there's still a large chance they did do it.

Yes, there's a reasonable doubt, it's reasonable, but you are sitting there, I am almost certain they did it.

Juror 6: Well, I feel like I'm going to lean more towards that and I'm going to base it on instinct.

Tell me more about instinct.

Juror 6: I can say, for me personally, my instinct has never led me wrong. I feel like if the evidence is there and I feel strongly, I'm going to base it on my instinct.

Anyone have a different opinion, the same opinion?

Juror 5: I definitely lean toward a greater burden of proof because I think the system is inclined to lean the other way. People who are accused, simply by the fact that they are accused, become more suspicious to people who are judging them, so as a counterbalance, we should probably lean to a really, really high burden of proof.

Juror 5: I think that the idea that more people will go free who

are innocent than will be convicted who are guilty, or the other way, is not the way the society and the justice system is set up, it just leans against people who are accused. They already have a strike against them of being accused. You can't let that prejudice you toward the fact that they might be innocent, unless there is an eyewitness.

So let me ask you, what if you find yourself . . . . A really hard situation might be, I have a reasonable doubt, but I am almost sure this person did it, but the law says I have to send them home. What do you do?

Juror 5: I think you have to send them home, right?

What about in the back row? What are you closer to?

Juror 1: I think I am probably closer to the reasonable doubt. A higher standard is a better standard. As the other juror mentioned, there is already a bias against the accused. And we all have our own personal biases just based on our own experiences. Just based on who the defendant is, we might have biases against something in their personality or something like that, so I feel like as a check against those that the burden is incredibly high, I think that's the right one to have.

Let me make the question a little harder. A lot of people can think it's a fair standard, but then you are sitting on a jury for a really serious crime such as murder, sexual assault, rape. You think this person probably did it, but there is reasonable doubt. Does the seriousness of the crime change how you feel?

Juror 1: I think it would change the way I would feel, but I don't think morally I could do that because there is this reasonable doubt and that's the standard I am trying to hold myself to. So I am going to try and stay to that standard. And I wouldn't like it, but I would probably do it.

What about you? Are you closer to having a hard time sending home a person who almost certainly did it? Or that reasonable doubt is absolutely the right standard? It might make it harder for you if this is a very serious crime. You think the person almost certainly did it, but the state has not proved it beyond reasonable doubt.

Juror 6: It would make it harder. But you would go with the evidence and what you feel. But it would definitely make it harder.

Let's go to the back row. The judge told you my client is charged with murder. What if you are almost certain he's guilty but there's a reasonable doubt? Are you closer to saying that with a crime this serious we can't send him home, or to saying that whether it's shoplifting or murder, the standard should still be beyond reasonable doubt?

Juror 3: I am probably closer to not sending him home. The burden of proof is difficult. Is it more realistic to follow a standard we're told or to follow what we believe is morally right? There's a potentially inner conflict there.

Who else feels that there might be a conflict between your morals, I mean who you are as a person, and what this law is asking you to do?

Juror 2: Just in my experience, being a juror locally in the past, I remember sitting down the last time I was on jury duty and I was told to "forget everything you know about law, all the TV shows you've seen about law and court proceedings and what I have to say here is my way or the highway." So you have to follow what they say whether you believe it or not.

Who else sees a moral conflict between the law about beyond reasonable doubt and who they are as a moral person? Suppose you're pretty sure the person is guilty, but the law says I have to consider reasonable doubt. You are faced with making a decision where, yes, there is a reasonable doubt that the state has not ruled out, but you're pretty sure this person did it. Yet the law says if there's reasonable doubt, you still have to find the person not guilty. How would you feel about that, in a case like a rape or a murder?

Think about the pill. It's reasonable to throw it out. Because you might get the poisoned pill. Think of the poisoned pill like being not guilty. It's reasonable to throw it out.

In a murder case, when you think he probably did it, but there is a reasonable doubt that has been identified, or someone else on the jury has identified or a lawyer has

identified, are you comfortable with the fact that the law says you have to send them home?
Juror 6: Yes, if we have not ruled out all possible reasonable doubts.

A friend of mine would tell you that if he were accused of something he did not do, he would scream it from the rooftop, any chance he got he'd tell you "I am innocent. I did not do this." He would certainly get up on the stand in front of the jury, put his hand on the Bible, and say he didn't do it and this is why. Now, there are other people who say you don't have to testify. And the judge says you can't consider it one way or the other.

Which side are you closer to: If I were accused of a crime I would testify, or the side that says it doesn't matter one way or another, I am not going to draw anything from it.

Juror 1: If it were me, I would want to testify, but I would understand it completely if someone did not want to testify. Some people are terrified to get up in front of a bunch of people they don't know and that's a very high-stress situation and people could cause incredible anxiety and it could come across that they are guilty just because they have such incredible anxiety about it. So I wouldn't necessarily judge somebody because of whether they decided to testify. I think it's an incredibly difficult matter and individual choice.

Does anyone have a different opinion?

Juror 5: I think it would be impossible for me to not factor that the defendant didn't testify into my summation of the situation. I could try to put that aside. I mean he doesn't have to; the law doesn't require him to. It would be impossible for me to put that aside. I mean even if I agreed with that decision, it would still be difficult for me to set aside that he didn't speak up for himself on the stand.

How about you?

Juror 3: In an ideal world, it would not affect me. But in a real world, that would become a part of it for me.

And you?

Juror 4: I would lean towards, if they did not defend themselves, I'd weigh it towards they must be guilty.

Who else?

Juror 2: I sort of agree that it wouldn't lean me one direction or the other. I think if someone didn't want to testify it might be a matter of fear somehow or fear of answering a question that could take them down a troubling path. No, I don't think that would inherently influence me one way or the other.

So my question is if someone was on trial, is accused of something they didn't do and didn't get up and swear they didn't do it, would it be hard for you to acquit, this person didn't even get up and tell me they didn't do it. Which side are you closer to?

Juror 2: I don't know all the legalese and that stuff, so sometimes it would be in my opinion to leave it up to the professionals to do their job. They might slip up. It's not slipping up but they can twist your words into however they want it to be, so I think I would leave it up to the professionals.

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1. Examples: Lisa Blue, Robert Hirschorn & Jennifer Lapinski, *Thinking Outside the Box Inside the Courtroom: Voir Dire* (AAJ Press); *Jurywork: Systematic Techniques* (NJP Litigation Consulting). (Jurywork is beyond the budget of most criminal defense lawyers, but your nearest law library should have it.) Also see *David Ball on Damages*, pp. 272–317 (Trial Guides).

2. Also see *David Ball on Damages 3*, Chapter 4 and Appendix A, for extensive guidance on framing and asking voir-dire questions. Most civil plaintiff attorneys own the book, so ask to borrow it. No need to buy it if you don't do civil plaintiff's cases. You should also see *Thinking Outside the Box Inside the Courtroom* and *Jurywork* (both cited in note 1). There are many other good voir-dire books, seminars, webinars, workshops, and articles. But Rule Out will be new to all of them, so don't let those resources pull you off what Rule Out needs.

3. This is an adapted version of the jurors' rights questions developed by Colorado public defenders David Wymore, Sunwolf, and others.

4. Thanks to Virginia attorney Chuck Zauzig for the Tylenol analogy.

5. Thanks to Florida attorney Thomas Hudson. He adds that having set the bar far higher than deciding whom to marry or where to live or what to do for a living, he gets answers that deal with the health or safety of the jurors' children.

Chapter 9

Opening Statement

By Shannon Tucker

Rule-Out opening statements can be done any number of ways. The common denominator is the focus on reasonable doubts and strict avoidance of any impression of proving innocence. Shannon Tucker, one of North Carolina's most experienced and respected assistant public defenders, provides this example.

Henry Clout Opening

Two men

Meet up late

On a winter's night

It's after midnight

On January 5, 2023

Donnie Baron is driving around Durham

The car Donnie's driving

Belongs to Willie Clout

The two men pick up a passenger, Henry Round

Henry gets into the backseat of the car

With the two older men

Donnie drives Willie's car to Willie's business

An all-night café

On Main Street

Donnie drops Willie off at the entrance

Then moves the car across the parking lot,

To a darker space, farther away

What happens next

Leads us to today

And to this trial

You already know your job is to listen to the evidence

It's the only way to know if the state can rule out reasonable doubt

Because the prosecution needs enough evidence to prove there are no logically possible alternatives

And when the evidence shows that there might be an alternative to any point the state has to prove, that alternative is a reasonable doubt.

I'm not here to prove that Henry is innocent

Because you're not here to decide if Henry *is* innocent

You're here to decide whether or not the state rules out the reasonable doubts.

Because if they can't prove that there are no reasonable doubts about the things they have to prove

You can't convict

We don't have to prove the alternatives. If even just one is possible—just maybe—then you can't convict.

Because the prosecutor needs enough evidence to prove there are no logically possible alternatives, and just one possible alternative, one reasonable doubt, means you have to acquit.

Because in that case, the role of a juror is to acquit

So listen carefully to the evidence being presented in this trial

Because to convict anyone of this crime

The state's evidence must prove certain facts

Alternatives to these facts are reasonable doubts

And when there's even just one

When the evidence shows that there might be an alternative to any point the state has to prove, that alternative is a reasonable doubt.

With that in mind, let me tell you what we *really* know about this case

And about some of the maybes that exist

Some of the alternatives

The reasonable doubts

Because the prosecutor cannot win unless he rules all of them out

The evidence will show that an altercation happened that night

That is a fact

Not a maybe

There is no doubt

The evidence will show that the altercation took place in Durham

That is a fact

Not a maybe

There is no doubt

The evidence will show that the altercation was between Donnie and Henry

That is a fact

Not a maybe

There is no doubt

The evidence will show that both Donnie and Henry were injured that night

That is a fact

Not a maybe

There is no doubt

The evidence will show that both Donnie and Henry were taken to the hospital

And were treated that night

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie died that night.

That is a fact

Not a maybe

There is no doubt

The prosecutor will tell you that Henry was responsible for the altercation

And thus, Donnie's death

In order to convict, the evidence must prove that Henry was

indeed responsible

But what if, maybe, Henry was not responsible?

If there is a logical alternative that Henry was not responsible, there is a reasonable doubt.

The prosecutor will tell you that Henry started the fight.

In order to convict, the evidence must prove that Henry started the fight.

But what if, maybe, Henry did not start the fight?

If there is a logical alternative that Henry did not start the fight, there is a reasonable doubt.

In order to convict, the evidence must prove that there is no reasonable possibility that Donnie started the fight.

You'll hear me ask the witnesses if they know of any evidence that rules out the possibility that maybe Donnie, not Henry, started this fight

Is there an alternative possibility that Donnie instigated the fight?

Because if the prosecutor does not have enough evidence to rule out the possibility that Donnie started the fight—it's a reasonable doubt

You'll hear me ask the witnesses if they know of any evidence that rules out the possibility that maybe Henry was just protecting himself.

Is there an alternative possibility that Henry was defending himself?

Because if the prosecutor does not have enough evidence to rule out the possibility—the

Maybe—that Henry was just protecting himself

Then maybe Henry acted in self-defense

And if Henry acted in self-defense

If that's a logical possibility

There is reasonable doubt

And if there's reasonable doubt

The role of a jury is to acquit

Self-defense means acquit

In other words, the prosecutor must rule out every maybe

Every alternative

Every reasonable doubt

But for all anyone can tell by the evidence, there are logical alternatives

Henry could have been the target, not the aggressor, of this fight

There are other alternatives to Henry starting the fight

Henry could have been asleep when Donnie attacked him

The evidence cannot rule that out

Henry could have been unconscious when Donnie attacked him

The evidence cannot rule that out

Henry could have been engrossed in his phone, paying no attention to Donnie when Donnie attacked him

The evidence cannot rule out that alternative

Henry Clout could have been the victim, not the aggressor, in this fight

None of the evidence rules out those other alternatives

And every alternative is a reasonable doubt

That keeps them from being able to convict

We don't have to prove that Henry was not the aggressor

But the evidence must prove there was no other way the fight could have happened

That there are no other alternatives

But the evidence leaves other alternatives open

And each alternative acquits unless the evidence rules it out

Such as the alternative that Henry could have been asleep

Or unconscious

Or engrossed in his phone

When the attack began

There are other alternatives to Henry starting the fight

The prosecutor does not have enough evidence to rule out the alternative possibility that Donnie started the fight—so it's possible—it's a reasonable doubt

Because maybe Henry did not start the fight

Anything the evidence does not or cannot rule out is a logical possibility

And our laws do not put people in prison when there is a logical possibility

That they were the victim of the attack

When there is a logical possibility

That they did not start the fight

But were the intended target of the assault

That's why the evidence is *required* to prove that the only logical alternative is that Henry was the instigator of the fight

Or there is reasonable doubt

The evidence will show that both Donnie and Henry were inside of the car when the altercation occurred that night

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie was in the front seat of the car

In the driver's seat

That is a fact

Not a maybe

There is no doubt

The evidence will show that Henry was in the back seat of the car

The passenger seat

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie was found on top of Henry, in the back seat of Willie's car

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie was older than Henry

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie was taller than Henry

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie was much heavier than Henry

That is a fact

Not a maybe

There is no doubt

The evidence will show that Donnie had a heart problem

That is a fact

Not a maybe

There is no doubt

To convict, the evidence has to prove that Henry attacked Donnie, from the back seat of Willie's car

That he somehow pulled the much larger, much heavier Donnie into the backseat, on top of him

And then attacked him

Without reason

Without provocation

But for all anyone can tell by the evidence, there are logical alternatives

There are other alternative possibilities than Henry starting the fight

Donnie could have willingly gotten into the back seat with Henry, for some reason

Donnie could have willingly gotten on top of Henry, for some

reason

Donnie could have attacked Henry from the front seat, and come over to the back, getting on top of him, to finish the job

There are other logical alternatives to Henry starting the fight

The prosecutor does not have enough evidence to rule out the alternative possibility that Donnie started the fight—so it's possible—it's a reasonable doubt

Because maybe Donnie started the fight

The evidence will show that both Henry and Donnie were cut that night

That is a fact

Not a maybe

There is no doubt

The evidence will show that both Henry and Donnie were injured that night

That is a fact

Not a maybe

There is no doubt.

The evidence will show that a knife was found in Willie's car that night

That is a fact

Not a maybe

There is no doubt

To convict, the evidence has to prove that Henry held that knife,

And attacked Donnie with that knife,

Without reason,

Without provocation,

And that Henry attacked Donnie first.

But for all anyone can tell by the evidence, there are other alternatives to Henry starting the fight

There are maybes

There are doubts

Henry could have had something else in his hand that night

A bag of food,

His car keys,

Or his cell phone

Some alternatives to a knife

There is a maybe

There is a doubt

The evidence will show the logical possibility that Henry might have had something other than a knife

He could have been messing around on his cell phone

The way young kids often do

Nothing rules out that possibility

That is a maybe

There is a doubt

The evidence has to prove that Henry had a knife that night

But the evidence cannot rule out the possibility that Henry did not have the knife

The evidence cannot rule out the possibility that it was Donnie who had the knife

That is a maybe

There is a doubt

Every alternative is a reasonable doubt

The prosecutor does not have enough evidence to rule out the possibility that Donnie had the knife

That Donnie started the fight—so it's possible that Henry did not start the fight

There is a reasonable doubt

You will hear that Donnie was taken to the hospital that night

And that he died

You will hear that Henry was taken to the hospital that night

And that he survived

As a result of the altercation that night

Between Donnie and Henry

Henry was arrested

And was charged with murder

Even though the prosecutor does not have enough evidence to rule out the alternative possibility that Donnie started the fight

Even though the prosecutor does not have enough evidence to rule out the possibility that Donnie had the knife

Even though the prosecutor does not have enough evidence to rule out the possibility that Henry was holding his cell phone instead of a knife

Even though the prosecutor does not have enough evidence to rule out that Henry was engrossed in his phone, not paying attention to Donnie

Even though the prosecutor does not have enough evidence to rule out that Henry was in the back seat of Willie's car when Donnie got on top of him and attacked him with the knife

Even though the prosecutor does not have enough evidence to rule out the possibility that Donnie was the aggressor that night

Even though the prosecutor does not have enough evidence to rule out the possibility that Donnie started the fight

There may be other things the evidence cannot rule out

There may be other alternatives

There may be other logical possibilities

There may be things that we missed

Look for them

Spot them on your own

Find them for yourself

And remember them

When you go back to deliberate

At the end of this trial

For every possible alternative is a reasonable doubt

And a reasonable doubt

Requires that you acquit.

Chapter 10

Direct Examination

Direct for Rule Out is pretty much the same as a non-Rule-Out direct, except you don't use it as something you must prove. While your witness can display certainty about their testimony, you should use it only as a basis for reasonable doubts that survive cross—that is, that the state cannot rule out as even *possibly* correct. So it does the state no good just to poke holes, even large holes. The state must show beyond reasonable doubt that your witness is wrong, which is far harder.

This works when the jurors know the principle, which you can show in opening with something like

> You'll hear Mr. Defense Witness say _____, and you'll see no evidence that rules it out.

Even more effective:

> You'll hear testimony that shows you the reasonable doubts the prosecutor can quarrel with but cannot rule out.

During testimony, after each answer that capsulizes a reasonable doubt, ask your witness:

> When you say _____, how sure are you that nothing can rule out the possibility you might be right?

This is appropriate because you should be allowed to ask witnesses to assess their degree of certainty. No matter their answer, the question, when you use it often, gets jurors to understand that you only need your witness to be *possibly* right—and that that's one

of the rules of the game.

Don't wait for closing to explain the principle. Never let jurors go on believing what they almost all unquestionably believe in every trial: that on each point, they're supposed to decide which witness is "more right" and reject the other one.

And you need your witnesses to understand it. It gives them confidence during direct and—more importantly—on cross. Confidence makes them feel more credible, so they'll come across better and worry a lot less that they can hurt your case. This is important, because worry about saying the wrong thing frightens many witnesses. That makes them nervous, and their nervousness makes them less credible. So make sure to say in advance, "It's OK if the prosecutor pokes holes. You don't have to be perfect. The worst the prosecutor can do is show that *maybe* you might be wrong. And *maybe* means we win."

In general, *never* tell a witness anything that can make them insecure or nervous. Your guidance must be couched in positive terms. Don't say, "If you say that the way you just said it, we'll lose the case." This can terrify them. Terrified witnesses make bad mistakes and come across as dishonest. And please don't give a witness a list of general pointers about testifying to study in advance; such lists make them nervous about testifying because they see it as a list of how they might screw up. You want witnesses who are relaxed, who feel that they need not be perfect, and who are secure in knowing that if they say anything wrong, it won't kill the case and you will be right there to come back on redirect and make it right.

Chapter 11

Cross-Examination

Apologies to Professor Wigmore, but cross-exam is the engine of reasonable doubts, not truth.

You can stream Roger Dodd's demonstration for Rule-Out cross-examination at https://www.malekpourball.com.

As you go through this section, keep in mind that reasonable doubts in testimony help only when the state has no other way to prove the point beyond a reasonable doubt.

To start with: The fundamental "Dodd question" for cross-examination establishes reasonable doubts:

> You don't know of anything, do you, that can rule out the logical possibility you could be wrong?

This section covers ways to use this question as well as related new and old methods of revealing and highlighting reasonable doubts.

Reasonable-Doubt Pile

As you establish each reasonable doubt, write it on its own sheet of paper and add it to a growing pile on your table so it's always in view. Never move the pile. Keep it in a transparent plastic desk tray so it won't scatter. Use yellow cardstock (heavyweight) paper. Have nothing else yellow on your table. Use the pile when you run through the reasonable doubts in closing.

Rule-Out Purpose of Cross-Examination

As with direct, cross-examination is for revealing reasonable doubts, not for showing the witness was wrong. *Possibly* wrong is all you need and all you should try for. Try showing that a witness is outright wrong and jurors will pay little if any attention to the reasonable doubts. But try showing reasonable doubts and jurors will know that that's what you need to win the case. Remember that basketball game (p. 10).

This principle expands: once jurors think you're required to prove a state's witness is wrong, jurors also think you must prove the state's whole case is wrong instead of there just being reasonable doubts about it. Don't fall back into this ugly old trap.

Passionate Pursuit

At all times, especially on cross, overtly and passionately pursue reasonable doubts. This teaches jurors the law by demonstration, not explanation. It's the grand opportunity of cross-examination. (Don't *try* to show passion; that's bad acting. Just *be* passionate about it and it will shine through.)

Visual and Concrete Doubts

The best reasonable doubts are visual and concrete, not abstract. Visuals and specifics are indelible; abstracts are forgettable.

Abstract is adequate, such as

It's possible John could have been elsewhere?

But visual and concrete are far better:

It's possible John might have been in New York City?

You might want to show a projection of, say, the Empire State Building or the Statue of Liberty.[1] Studies show that a picture, even when unnecessary for clarity, strengthens memory.[2]

Abstract:

So for all you know, Mr. Forensicist, the transport temperature could have been too hot?

Visual/concrete:

So for all you know, Mr. Forensicist, the thermometer's needle could have gone into the red zone over 80?

Project a picture of a thermometer dial, black pointer over 80 into the red. (Use these projections only for key reasonable doubts.

Having too many visuals diminishes their effect.)

Frame Questions

When you can, start each cross-exam topic with frame questions. A frame question establishes a principle, truth, or other factor—including about the law, when allowed—that sets up your questions that show reasonable doubt(s).

Frame question example:

- People's memory can sometimes be mistaken?

This frame (underlined in the following) establishes the principle that memory can be mistaken. Your next questions reveal reasonable doubts based on that principle. This process should usually include the Dodd question.

For example:

- People's memory can be mistaken?

You saw the attack?

Next day the police called you?

Took you to the station?

For a photo lineup?

You picked someone out?

Based on your memory?

[*Dodd question*] Can you help the jurors with anything that rules

out the possibility that your memory might possibly be mistaken?

Other possible frame questions:

- People sometimes remember faces wrong?
- People sometimes remember a stranger's face wrong?
- Because half of all face identifications turn out to be mistaken, let me ask whether you know of anything that rules out the possibility you might be mistaken in this case.
- Two people can make the same mistake? Or three people? Sometimes more?
- Ever known anyone to be absolutely certain about something who later learned they were mistaken?
- Sometimes a person sees something differently than others?

Sometimes you'll use multiple questions to establish a frame. Examples:

Good science requires keeping records?
Records of how the research is conducted?
So you can go back and check whether you might have missed anything?
And so others can check whether you might have missed anything?
Others such as jurors?

Then ask questions that show there are no records, or that they're wrong or incomplete. Use the Dodd question as appropriate.

Another example of multiple questions that establish a frame:

When a forensic expert's results are accurate, another forensic expert outside your lab using the same method and evidence would get the same results?
This is called *reproducibility*?
It makes the results more trustworthy?
And if it's not reproduced by someone outside your lab, the results are less trustworthy?
But nobody outside your lab reproduced what you did?

If they don't answer this kind of question (e.g., "No, it does not mean it's less trustworthy"), be prepared to impeach that answer.

And note that the gap between *more trustworthy* and *less trustworthy* contains reasonable doubt.

Other multiple-question frames:

Photo lineups are done according to a protocol?
Meaning a list of required steps?
Each step is for the sake of reliability?
So the witness will be less likely to pick the wrong photo?
Your office has a copy of the protocol?
It has _#_ steps?
Including A?
And B?
And . . . [list those they can't prove they did properly]
Reliable testing requires the right storage temperature?
Because too high or too low means the test might not work right?
So blood must be stored between 36 and 43 degrees?

Extended example:

Error rate is important?
Error rate tells us how often your method's results are wrong?
Not "might" be wrong, but has actually *been* wrong?
So it's really the *known* error rate?
As based on research of its known results?
Lower error rate means less often wrong?
Higher error rate means more often wrong?
There's no such thing as a 0 percent known error rate, is there?
Which means sometimes your method is wrong?
Even when you do everything right?
And if you *don't* do something right, there's a greater possibility the test might be wrong?
In fact, the more things you don't do right, the more likely your results might be wrong?
You don't know the error rate for the method you used, do you?
You did not tell us what it is?
So based on your testimony, jurors would not know it?
Or even that one existed?
And you know of no evidence, do you, that rules out the possibility that one of the times the error rate says your method will be wrong could have been this time?

Templates

After your framing question(s)—or for a topic without one—build your cross-exams around whichever of the following templates (or something similar) is appropriate.

Fact-witness template:

You testified that _____?
[*Dodd question*]: You know of no evidence, do you, that rules out the possibility that _____?
Or that rules out the possibility that _____?
Or _____?
Or _____?

Template filled in:

You testified that you heard them fighting just after eight in the morning?

(frame) Sometimes people can think a sound is coming from one direction when it might really be coming from someplace else?
(frame) For example, sound can echo or bounce from one place to another?
(frame) And sometimes different people can sound alike?
(frame) Especially when they're yelling and screaming?
(Dodd question): You know of no evidence, do you, that rules out the possibility that the sound might have come from a different direction than you thought?
Or that it might have been different people than you thought?
Or that the sound might have been coming from next to the house instead of inside?
And you know of no evidence that rules out the possibility that what you heard might have been the television?
Or that you read your watch wrong?
Or that with all the excitement you might have been mistaken about the time?
Detective, you testified about the evidence that John was at the scene?
In Boston?
You know of no evidence, do you, that rules out the possibility that
John might have been someplace else?
Such as Stamford? You know of no evidence that rules out the possibility he was in Stamford, do you?
Or Cape Cod?
Gloucester?
Or anyplace else I could name?
Or maybe home sleeping?
Or that someone who looked like John might have been the man at the scene?

The template for forensics, confession interviews, photo lineups, taking suspect statements, and so forth follows. This is just an extended version of those preceding.

Three Parts to This Template

First: Establish (frame) the required step or condition, such as "maintain temperature under 80 degrees," "photo lineup staff must not be involved with investigating the case," and so on. This can take multiple frame questions. For example:

You testified that the blood was collected with a swab?
Like this one? [show it, keep it in hand]
(frame) Your protocol requires a sterile swab?
(frame) Meaning no contamination?
(frame) Doubt about it being sterile creates doubt about the test results?[3]
(frame) Such as from a chemical that should not be there?
(frame) Such as bleach?
(frame) Or gasoline, grease, oil?
(frame) How about bacteria?
(frame) A sneeze or cough can transfer bacteria to the swab?
(frame) Even breathing on it like this [*demonstrate it*]?
(frame) Touching it without gloves?
(frame) Touching it to anything else?
(frame) Anything contaminated can transfer contamination to the
blood specimen?

Second, establish the consequence of omitting or violating the step or condition. In the swab example, this means the possible consequences of not meeting the sterility step. For example:

(frame) A contaminated swab might throw off the test?
(frame) Make it unreliable?
(frame) Meaning it could be wrong?
(frame) That's why your protocol *requires* uncontaminated swabs?

Third, establish the reasonable doubt(s) about whether the requirement was met. For example:

You know of no evidence, do you, that rules out the possibility that someone at the packaging plant might have coughed on it before wrapping and labeling it?
Or breathed on it? Like this? [do it—quickly and not a hard puff]
Or sneezed?
Or touched the swab without realizing it?
Or accidentally let the swab touch something else?
And you know of no evidence, do you, that rules out the possibility that someone at the plant might have unknowingly done anything else that could have contaminated the swab before wrapping it?

Use this sequence for each protocol step from collection through end of testing. This means you have to know everything that must be done to properly execute each step, as well as each of the conditions necessary (temperature maintenance, storage materials and humidity, etc.) and anything else that can affect the reliability of the expert's conclusion. Gathering all this is easier than it sounds: most labs have protocols. If—and only if—they don't, look for them online. Look first for any that are specific to your state, as you'll find in North Carolina. And as of this writing, AI websites such as ChatGTP have just sprung up. Even this early, they quickly give you the steps of the various forensics methods. Be sure to check all AI information: always ask it to check itself. And always ask for "*more*" or you'll get incomplete answers, especially for lists such as protocol steps. Wherever you find the protocol, run it by an outside expert to check for completeness and help you understand how and why each step must be done.

And make sure jurors understand how subfacts work (p. 25).

Even when there's no established protocol, there will always be required steps and conditions. If not, the process is not science. *Daubert* and *Frye* require accepted methodology.

In addition to protocol, this next set of questions can help show reasonable doubts about forensics.

You do _#_ of these tests per day?
Each requires careful attention to _#_ steps?
That means the careful and verified completion of _#_ steps every hour?

The testifying forensicist does not personally execute every step of the protocol. Many, often most, steps are executed by the other lab staff, the police, and sometimes outside consultants to the lab or the prosecution. However, for the testifying forensicist's opinion testimony to be reliable beyond reasonable doubt, the forensicist must be able to rule out the reasonable doubts about whether everyone involved in the entire process properly followed every protocol step.

Some venues allow the forensicist to assume that they all did, but that does not mean that jurors have to make the same assumption. So if the testifying forensicist says that you'd have to ask those other people about whether they did their work properly, then—unless the state has had them testify—there's reasonable doubt about every step they'd have taken. (When you point this out in closing, also explain that it's the prosecutor's obligation—not yours—to prove that their forensics were done right. "They'd have

brought those other folks in if they'd actually done everything the way it's required. The fact that they did not bring them in creates reasonable doubt about it. And in deliberations you might want to discuss why the prosecutor did not bring them in.")

Cognitive Biases and Voir Dire

We all have cognitive biases. They're part of every human brain. Each cognitive bias distorts, in its own way, objective perception, memory, decision-making, and judgment. No one is immune from their distortions. Specially designed tests are available to help you learn about your own cognitive biases. The tests are available to everyone online and are interesting to take—but they're not very accurate.[4]

People are generally unaware of their cognitive biases and can tell only rarely when one or more are affecting thinking.

Most cognitive biases have evolved, some are learned, all serve —or early in our lineage served—one or another useful purpose. This sounds odd in light of the fact that they distort objectivity.

While there's a great deal to learn about cognitive biases, for cross-examination purposes we need know only which cognitive bias(es) might possibly be distorting a witness's testimony. However, the more you understand how they and other distorting factors work inside the mind, the more routes you have to finding reasonable doubt. Eagleman's *Incognito* and Kahnemann's *Thinking, Fast and Slow* will get you well under way.

Example: *safety bias*. It makes a danger seem greater than it is and thus makes us pay extra attention to the danger. For example, an attention bias makes us rivet our attention on a perp's brandished pistol and pay less attention to the perp's face; the former is the immediate—and therefore greater—danger. Cognitive bias directs our attention to the emergency danger and away from being able to later identify the perp's face, a nonemergency need. Its purpose is to make sure we can instantly react if the gun is turned our way, as opposed to not seeing it in time if we were equally dividing our attention between the gun and the perp's face. (See more about this in the section on memory, p. 61.)

This seems like common sense, but most cognitive biases are much less obvious.

Whatever the cognitive bias is that applies to a given situation, incorporate it into your cross. No need to mention the name of the bias, and especially don't use the word *bias*.

You saw the man?
For about half a minute?
You saw what he was holding?
A pistol?
It looked dangerous?
He might shoot someone?
He might suddenly turn the pistol towards you and shoot?
You were scared?
(frame) Sometimes when people are scared, they don't see everything accurately?
(frame) Or remember everything accurately?
Do you know of any evidence that rules out the possibility that being scared might have led you to see things a bit mistakenly?
Or that you might be remembering some things mistakenly?
(frame) And when people look at someone holding a gun, they often pay attention mostly to the gun?
Do you know of any evidence that rules out the possibility that that might have affected you?

Next is a brief list of some common cognitive biases that can help you show reasonable doubts. Before each trial, review the list—and others—to find any that help. There are more exhaustive lists online and in books such as *BIAS: Encyclopedia of Biases and Heuristics*.[5]

In voir dire, you can also ask about the experience of the prospective jurors with whichever cognitive biases you'll use in trial. Again, describe the bias but don't use the term *cognitive bias*.

Common Cognitive Biases for Cross-Examination

Note that different sources use different names for many cognitive biases.

- **Confirmation bias:** Favoring information that confirms preexisting beliefs.
- **Anchoring bias:** Overreliance on previous information despite availability of new information.
- **Attention-blinding bias:** Not seeing something in front of you because you don't expect it.
- **Availability bias:** Reliance on the best-remembered or most-available information in making decisions or forming

opinions.

• **Halo bias:** Generalizing positive traits or impressions about a person or thing based on a single characteristic or initial impression.

• **Hindsight bias:** After-the-fact belief that an event was predictable.

• **Overconfidence bias:** Overestimating one's abilities, judgment, or knowledge.

• **Selective perception bias:** Perceiving and interpreting information in a way that aligns with one's existing beliefs or expectations. (Similar to confirmation bias.)

• **Authority bias:** Attributing undeserved credibility to an authority figure.

• **Recency bias:** Giving more weight or importance to recent events or information when making judgments or decisions.

• **In-group bias:** Favoring members of one's own group.

• **Out-group uniformity bias:** Seeing group members as more alike than they are.

• **Fundamental attribution error:** Basing judgment about a person solely or mostly on their general characteristics (e.g., age, sex).

• **Connection bias:** Thinking that certain things or events are connected though they're not.

• **Illusion of control bias:** Belief that one has more control over events or outcomes than one has.

Jailhouse Snitch, False Confession

Don't try proving that a snitch is lying. Don't try proving that a false confession is false. Don't try proving *anything*. With very rare exceptions, reasonable doubt is all you ever need and all you should try to get.

So, for example:

They asked you to testify?
They said you'd have to tell the truth?
But as you sit here now, you know of no evidence that rules out the possibility you're not telling the truth?
Do you recognize anyone on the jury?
Every juror is a complete stranger to you?
And as far as you know, you're a complete stranger to them?
You know of no evidence, do you, that would help them rule

out any reasons to mistrust you?

Remember to stream Roger Dodd's cross-exam demonstration at https://www.malekpourball.com/.

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1. Suggestion to use projection slides comes from North Carolina attorney and Duke law professor Donald H. Beskind.

2. See, for example, Merrin Creath Oliver, Rebecca Brooke Bays & Karen M. Zabrucky, False Memories and the DRM Paradigm: Effects of Imagery, List, and Test Type, *The Journal of General Psychology* 143 (1), 2016, p. 33. DOI: 10.1080/00221309.2015.1110558.

3. See subfacts, p. 25.

4. Project Implicit, Harvard Univ., https://implicit.harvard.edu/implicit/takeatest.html (last visited Jan. 2, 2024).

5. Kindle edition, published by Behavioral Research Group.

Chapter 12

Closing Argument

Guide and Samples

Ingredients for closing include:

1. Explanation of the jurors' three jobs: Be logical, follow the law, and get other jurors to follow the law.
2. Arming the jurors so they know what to say to argue for you in deliberations.
3. Reprise of the third and fourth jurors' rights questions.
4. "Massaging" instructions and verdict issues.
5. Dominoes demonstration.[1]

"Marshaling the evidence"—meaning to go review the evidence as if the jurors forgot it all—is not on the list. Don't do it. It's boring, useless, and insulting. Instead, you'll incorporate the necessary evidence in better ways, as you'll see.

Let's look at the second point on the preceding list and return later to the first.

Arming the Jurors

Closing's most important purpose is to arm your favorable jurors to fight for you in deliberations and to stand firm in their beliefs regardless of time and pressure. Persuasion is just your second-to-last goal; your ultimate goal is arming them so that they'll know exactly how to fight on your behalf. Otherwise your persuasion usually does not help as much as you need it to.

By the end of testimony, most jurors are sure they've made up their minds. They don't much think they need anything more from

you in closing—so they barely listen. (They'll look like they're listening intently, but don't be fooled; the whole world learns that trick before the middle of second grade.) This means that before anything else in closing, you have to get them to listen at maximum level.

Once they start listening, you need to give them something more than persuasion or they stop listening again.

You get them to listen from the start by telling them that in deliberations they'll have three jobs. They assumed it was only one—everyone does, even you—and since it involves something they're going to have to do, it gets their attention and they start listening. And when they hear that you're going to help them do their jobs, they *keep* listening. Now they're primed for you even if they're leaning against you.

At this point you start arming them to fight for you. How does this help you?

1. Arming provides information jurors want: defense jurors want to hear how to prevail in deliberations, and prosecution jurors want to hear what they'll have to contend with in deliberations. So all of them have reason to listen to you carefully, and they do.
2. Because what you say for arming is also among the most effective ways to persuade hostile jurors, the fact that they're listening carefully gives you your optimal shot at persuading them.
3. Many jurors are insecure and nervous about deliberating. It's a kind of public speaking and thus among the greatest fears of most people. But arming the jurors makes them feel better because it tells them how to do it. Since arming comes from you, you have a greater chance of them eventually gravitating to your side.
4. After trials, many jurors tell us, "I knew we should acquit. I just didn't know how to convince the others." Arming gives jurors the specific words and phrases they'll remember and comfortably use.
5. Armed jurors—even quiet or shy ones—are more likely to speak up in deliberations. Speaking up solidifies their opinions and makes other jurors who agree into stronger advocates for the defendant. They take heart from each other and band together in mutual support. And as a team, they're less likely to fold.

How to Arm

Arming requires ammunition: the exact words for jurors to use.

First, list (for yourself, not the jurors) everything that hostile jurors will likely say to support conviction. This includes their mistakes about law (especially reasonable doubt), anything about the facts and state-favoring arguments, and anything else that can hurt the defendant. (Inexpensive and even free focus groups can help you spot hostile points. See p. 165 on using focus groups, an enormous help in spotting these points.)

You need at least one arming bullet for each hostile point. Each bullet must be

Brief
Simple
Direct
Crystal clear
Everyday language

Above all, word your bullets for jurors to remember and easily use them. You see examples of bullets next and in the sample closing later in this section.

Template for bullets:

During deliberations, if someone says X, remind them that Y.

Examples:

During deliberations, if anyone says it was John's gun, remind them that for all anyone can tell by the [believable] evidence, it *could have been* someone else's gun.

And

Ask that juror to explain how the evidence rules out the reasonable doubts about whether it might have been someone else's gun.

If anyone in deliberations says they can't acquit just because of a reasonable doubt about a small point like the blood's storage temperature, remind them that reasonable doubt about that small fact means reasonable doubt about the big fact that it was John's blood.

If someone says guilty, ask them to show you that there's enough evidence *to rule out your reasonable doubts*.

If someone says *they feel strongly* [or have a hunch, etc.] that John did it, remind them their verdict must be *logical*, not a feeling [or hunch or whatever].

If someone says three eyewitnesses can't be wrong, remind them that *three people and even hundreds of people are wrong about the same thing all the time,* so the only thing to go by is whether or not there's reasonable doubt about what they're saying, not how many of them there are.

If anyone thinks __A_ is true, remind them there's not enough evidence to rule out __B_.

These arming statements are easily remembered and go directly to the point. They teach your favorable jurors what to say. They help bring movable opposition jurors your way. And they continually remind jurors that they cannot convict unless the prosecutor logically rules out every reasonable doubt.

You want to include an arming statement for every one of the important reasonable doubts. If there are too many to cover them all, don't worry about it. Jurors will get the idea and do the rest on their own.

Sometimes you'll need a slightly more elaborate approach. For example:

If anyone believes state's witness X, ask the juror to explain
what the witness *said* that proves they could not have been mistaken.
NOT how they looked or sounded,
not what they wore,
not how confident they seemed;
those are subjective personal judgments, and you have to be logically objective.
So what did they actually say that objectively and logically rules out reasonable doubt that the witness could be wrong?

Other Benefits of Arming

It drives presumption of innocence and burden of proof into deliberations.
It pinpoints the reasonable doubts.
It motivates and justifies acquittal.
It helps keep favorable jurors from folding.
Each bullet is *black-and-white*, *clean-edged*, and *objective*, so jurors are confident in it.
Opposing jurors cannot easily overcome or satisfy the bullets.

After giving jurors your arming statements, say:

> You might want to start deliberations by going around the table for each of you to say what your own reasonable doubts are. Keep a running list as you each add new ones.
>
> Remember that you can have reasonable doubts none of the lawyers thought of. So if you wake up with a reasonable doubt you just thought of in the middle of the night, it still counts. As long as it's a doubt based on reason, a logical possibility that some fact the government must prove in order to convict might logically—just maybe—be wrong.
>
> And when someone else describes one of their reasonable doubts that you did not have, it also counts if you agree it's logical.

Reprise the third and fourth jurors' rights questions (the disrespect questions).

Whether or not you were allowed to ask them in voir dire, in closing use the content of questions 3 and 4 (p. 96), as in the example that follows. They motivate jurors to decide on the basis of reasonable doubts and to get the other jurors to do the same. They also help keep your favorable jurors from folding.

> Remember: when you go home after trial ends, you have the right to know that the jury you served on *stayed within the law*. That includes the law about reasonable doubts. When you have reasonable doubt about any fact the government has to prove, then to stay within the law, you cannot vote to convict.
>
> No one—not me or the prosecutor or the judge or any other juror—has the right to *disrespect* you enough to pressure or bully you or shame you into violating the oath or affirmation you took to stay within the law.
>
> Ask yourself which you prefer: Following the law? Or letting someone disrespect you? If anyone tries, just tell them, "Stop!" You did not come here to be disrespected, and you don't have to put up with it.
>
> If that does not work, send a request out to the judge to come talk to a juror who's trying to get you to violate the law.
>
> Of course, you should all discuss and argue—but not about whether to follow the law.

This works for you as long as jurors know that the law prevents conviction when there are any reasonable doubts.

"Disrespect" is almost a magic word. It's the most hateful of affronts. No one voluntarily accepts being disrespected. Being disrespected in front of other people can be so painful that people often feel it for years. Disrespect starts wars, divides families, determines presidential elections, and leads to holocausts.

In some situations—prisons, late evening bars, even driving on the highway (road rage is almost always the result of perceived disrespect)—disrespecting someone can get you attacked and even killed. In fact, disrespect triggers most bad things people do to each other. Disrespect drives rage, revenge, jealousy, and violence. Repelling and avoiding disrespect are among our stronger drives.

(To protect your right to use this argument, be prepared to explain to the court that you're not trying to "enflame jurors" but prevent jurors from being enflamed by anyone trying to get them to violate their oaths. Judges who want jurors to follow the law would do well to use this disrespect admonition.)

Massaging the Instructions

Massaging means explaining whichever jury instructions you need jurors to clearly understand.

Long before closings, Rule Out assures that jurors understand reasonable doubt, burden of proof, and presumption of innocence. So you're OK even if you're in a venue that prevents you from discussing the law in closing. So massage reasonable doubt in closing whether or not jurors already know all about it. In closing, you should be allowed to show how the facts apply to the law, because that's the purpose of closing.

You massage an instruction by

Displaying the part of the instruction you need jurors to get right.
Reading it aloud.
Explaining it in clear, plain-English terms.

Showing how the evidence applies to that particular law—and how that in turn requires acquittal.

Example (adjust to meet your court's particular instruction):

- Display the part of the instruction that says that to convict, the jury must decide the defendant is guilty beyond

reasonable doubt. Display it and allow jurors a moment to read it.

• Read it aloud.

• Explain it:

This instruction means that you cannot convict unless the prosecutor ruled out [or *eliminated* or *proved out*, etc.] every reasonable doubt.

A reasonable doubt is a doubt based on reason. Reason means logic.

So *beyond reasonable doubt* means beyond any logically possible doubt about any fact the prosecutor must prove.

This instruction also says to use your common sense. That means to use your common sense to tell you whether the state has ruled out the reasonable doubts. Common sense does *not* mean guessing or estimating or going by feelings or impressions, or by gut feelings, or hunches, or anything else except the pure logic of whether the prosecutor ruled out the reasonable doubts.

• Show how to apply this law to the evidence:

Let's look at how to apply this instruction to the state's blood evidence. This instruction tells us that you cannot convict unless the state logically rules out reasonable doubt about whether the blood was John's. So does the defense have enough evidence to do that? Let's look:

The police get the call two hours after the shooting and arrive 15 minutes later. Twenty minutes after that, the police technician gathers the blood sample. That means almost two and a half hours pass when no one knows who or what else might have been at the crime scene. Two and a half hours during which anything or anyone could have come along and coughed near the blood, or touched it, or even bled on it themselves, or did anything else that could have contaminated it. If it could have been contaminated, then it cannot be reliably tested. So there's a reasonable doubt about whether it's John's blood.

And that means . . .

On an exhibit of the verdict issues page, circle or check "not guilty."

. . . not guilty.

Do this each time you mention another reasonable doubt.

Some jury instructions contain dangerous phrases that lower

how jurors see the state's burden unless you explain. So show the dangerous words on the flip chart, such as "A reasonable doubt is not every doubt."

1. Read those words aloud.
2. Explain what they mean.

   This means that a reasonable doubt must be a doubt based on logic and that can exist in the real world. Not a doubt based on fantasy or a doubt that's illogical. So it can't be, for example, "John could have been in China that evening when the crime took place." That's not a *reasonable* doubt because we know he was in Boston at 8 A.M. the next morning, and you can't get from China to Boston overnight. It's not a possible real-world doubt. That's the kind that doesn't count.

3. *Apply your explanation to the evidence:*
   a. But in the real world, John logically could have been in Hartford during the crime. So it's a real-world reasonable doubt and it counts.

Dominoes Demonstration (Instructions)

The dominoes demonstration tightly focuses the case onto reasonable doubts. New Jersey civil plaintiff's attorney Ed Capozzi invented this demonstration to show proximate cause, a tricky legal construct that jurors have trouble understanding. (If you do personal injury work for plaintiffs, you need Ed's book called *The Domino Theory*.[2])

Jurors have even more trouble understanding how to apply reasonable doubts. The Rule-Out adaptation of the dominoes demonstration, which Ed demonstrates for us (stream it at MalekpourBall.com), makes it clear. And there's an example later.

Closing Your Closing:

Remember: Follow the law. The law in this case ultimately rests on one question: did the government logically rule out every reasonable doubt about facts they need to prove?

When you see that the government does not have enough evidence to rule out every reasonable doubt, your only logical verdict is not guilty.

Samples

This section demonstrates many but not all of the preceding suggestions for what to say in closing, though some might be irrelevant in your case or venue. Final selection, of course, depends on your venue and case.

Important: Tone and specific word choice are personal to each lawyer. Don't imitate mine unless they reflect yours. Maintain the content, sequence, and meanings of what follows, but it must come from the real you, not me.

Parts of this sample may look a bit odd on the page, because some sentences are divided into separate lines. That's to help you see each individual point to get across. A very brief vocal break at the end of each line is all it takes. These little breaks also keep you from rushing through your most important points.

This sample provides the framework. You have to add as many specific reasonable doubts as possible from your case. Most will come during the dominoes demonstration, but you want them wherever else you can work them in.

Good morning.

You're about to have some decisions to make. I'd like to suggest some ways to go about doing that.

First, keep in mind that a trial is a test of the government's case.

You have to decide if the government's case passes that test:

Does the government have enough believable evidence to logically and completely rule out every reasonable doubt about every fact required to convict?

To make that decision [for each count], in deliberations you'll have three jobs. You probably thought you have just one, but it's three. So I'll try to help you do them.

One of your jobs will be to show each other how your decisions are based on logic.

Entirely on logic.

Not on feelings.

Not on impressions.

Not on instinct or gut feelings.

Just cold, hard logic:

Did the government logically—*logically*—rule out every reasonable doubt about every fact they have to prove?

If they don't, then to stay within the law, you acquit.

So that's your first job: base everything on logic. It's one of the law's most important requirements. Without pure logic there's no law.

Your second job is to stay *within* the law.

No one has the right to disrespect you enough to pressure or bully you, or fight with you or do *anything else* to try to get you to violate your oath or affirmation that you took here in open court: your promise to stay within the law.

Of course you have to talk about the case and argue and make sure everyone has their say. In fact, some juries start by going around the table for everyone to have their say about what their reasonable doubts are. Keep track of them. Write them down. That helps keep everyone within the law and can save hours of deliberation time.

In fact, as soon as you all agree that there's even one reasonable doubt about anything the government must prove, your work is done. And you don't all need to have reasonable doubt about the same thing.

So discuss and argue, and listen openly to each other. But let no one drag you outside the law. If anyone tries and won't stop, send a request out to the judge to please come talk to that juror about following the law.

Your third job? The same thing in reverse: In the same way you won't let yourself be disrespected by anyone trying to get you to violate the law, your third job is to stay respectful of every other juror's right to stay within the law.

Those are your three jobs. They end when you finish filling

in the verdict form.

So let's look at the law the judge will tell you about.

Flip back the blank cover page of a flip chart to show an exact replica of the verdict form's issues. (When the issues take more than one page, flip pages as needed rather than crowding up a single page.)

Leave the flip chart in place through the end of your closing.

Give jurors a moment to read the page the flip chart is open to. Don't block their view. Don't talk. Jurors don't read and listen well at the same time. And when you let them read without your talking, you bolster the importance of what they're reading and make them feel you respect them.

Next—still without talking—open a second flip chart to show the most relevant parts of the instruction on reasonable doubt or beyond reasonable doubt. Allow a moment for jurors to read it to themselves.

Then read it aloud. For example:

> "A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be."
>
> This is part of the law the judge will give you about how to answer these verdict questions.

Do not automatically use the explanations offered here. They're just samples to show what needs to be done. Craft your own explanations so that they're true in your venue and you can support your right to say them.

> It says reason. "A reasonable doubt is a doubt based on reason."
> *Reason* means *logic*.
>
> So just ask whether it's *logically* possible that maybe there's some doubt about anything the government has to prove.
>
> That's always the question. Just remember the logic requirement.
>
> This also says *common sense*.
>
> You use your common sense to tell you when something is

logical.

So when your common sense

tells you it's *logically* possible

that maybe the government might be wrong

about something they must prove,

then it's a reasonable doubt.

So you'd acquit.

Even if just maybe the government might be wrong.

Just *maybe*.

That's why it's called a reasonable *doubt*:

Maybe right, maybe wrong.

Even a small maybe is enough to require that you acquit.

Because maybe logically means a reasonable doubt.

This instruction also says that a reasonable doubt can arise from a *lack or insufficiency of evidence*.

So the government cannot convict

unless it has *enough* evidence—

sufficient evidence—

to rule out every reasonable doubt.

Now relate this concept to the evidence:

For example, is there enough evidence to rule out reasonable doubt about whether John was in Boston?

How do you decide?

Rely on logic. Like this:

Given the evidence, is it logical to think that there's even a

small possibility John could have been someplace else? Even a small maybe?

So is there enough evidence to *logically* rule out the possibility that maybe John was someplace other than Boston? Like walking down a street in New York? Eating lunch in Hartford? Driving around the Beltway? Doing anything anywhere else?

Or is Boston the one and only logical possibility? During deliberations, if that's what anyone thinks, ask them to explain what they think the evidence is that logically rules out the possibility that maybe John was elsewhere. The evidence, not their feelings, not even their strong feelings, but their logic.

Use this next point a number of times in closing; it is extremely important.

If that juror cannot logically explain how the evidence rules out the possibility of reasonable doubt about where John was, then no matter what that juror thinks, it's a reasonable doubt.

And that means acquit.

You can have hunches, feelings, and gut instincts, but they don't count without logic that proves them correct. Without logic you can't base any decisions on them.

Then run the entire routine again with another important jury instruction. Go to the next flipchart page to show, for example:

"Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt."

Let jurors read it to themselves, then you read it aloud. Then:

Fully satisfies. *Entirely* convinces. That means all or nothing. *Fully satisfies* or *entirely convinces* means you have to be entirely convinced that there are no reasonable doubts. Or you cannot legally convict.

It means the government's evidence must be true with no reasonable doubts. Not *mostly* beyond reasonable doubt, not

almost fully—but totally. Completely.

Please pay special attention to the fact that *you are not asked to think about whether John is innocent*. That's how it is on TV. But this case is real. In a real case you only choose whether the government did or did not logically rule out all the reasonable doubts. Nothing about innocence. Either the government did rule them all out or did not rule them all out. That's all you can decide.

Yes goes here. [point to "guilty" on verdict form]

No goes here. [point to "not guilty" on verdict form]

"Not guilty" does not mean innocent; it just means *not proven guilty*.

So during deliberations, if anyone says we did not prove him innocent, remind them that you're not supposed to do that. The justice system does not ask that question.

It's just: *reasonable doubts? Yes or no?*

And how big a reasonable doubt? In deliberations, a juror talking about a particular reasonable doubt might say, "It's just not a *big* enough reasonable doubt to acquit." Remind that juror that the judge won't say that a reasonable doubt has to be big enough. Any reasonable doubt acquits. You cannot put a number on it, such as by saying that something is in 50 percent reasonable doubt or 15 percent or one percent or one half. It makes no difference. Remember that one cyanide capsule that might be in that huge bottle of Tylenol? Maybe a cyanide out of a thousand or two. Still too big a reasonable doubt to bring that bottle home for your family to use.

And does it make any difference how small a reasonable doubt there might be about whether a complete stranger is trustworthy enough for you to let them tell your kids when it's OK to cross a busy street? Not a crossing guard but just some random stranger.

Either there's a reasonable doubt or there is not. Yes or no. That's all that counts. Big or little makes no difference.

> And here's something you'll like: If you get to the point where all of you agree that there's at least one reasonable doubt—even when you don't all have the same one—then your work is done.
>
> So some of you might think there's reasonable doubt about whether John was in Boston.
>
> Another juror might think there's reasonable doubt about whether the pistol was really John's.
>
> Others might think that the government did not rule out the possibility that whoever did the shooting was defending themselves, so it was self-defense.
>
> Some of you might think it's all of those. Or other ones.
>
> Makes no difference. If you each have at least one reasonable doubt, your work is done.

Be more thorough than I've been so far: when you can, show how each instruction you discuss applies to multiple reasonable doubts.

Then reprise jurors' rights questions 3 and 4—the disrespect questions. Do this in closing whether or not you could ask them in voir dire.

> Remember this: no one is allowed to take away your absolute right, your *freedom* to go home after all this is over knowing that the jury you served on *stayed within the law*. No one has the right to *disrespect* you by asking you, or pressuring or threatening or bullying you, or trying in any way to get any of you to do anything that would violate your personal oath or affirmation that yes, you *will* follow the law.
>
> You have the freedom to stay within the law. Your choice is easy: would you prefer to follow the law or let someone disrespect you who does not care about the law?
>
> So during deliberations, if any juror argues, bullies, pressures, threatens, or even suggests that you convict when you have even one reasonable doubt, remind them *they have no right* to ask. Tell them to stop. If they don't stop, call the judge.

Why does this work? Because disrespect is among the most insulting and most hateful of affronts. No one passively accepts disrespect when they can help it. Disrespect hurts so much that people can carry its pain for years. Disrespect has started wars, divided families, and created holocausts.

In some situations—prisons, late evening bars, even driving on the highway (road rage is almost always the result of perceived disrespect)—disrespecting someone can get you killed. And being disrespected is deeply humiliating.

Disrespect triggers most bad things people do to each other. It drives rage, revenge, jealousy, violence, negligence, street crimes, even wars. People strive for wealth and dominance largely for the sake of respect.

Our repulsion to being disrespected is deeply ingrained and powerful. It evolved to help us survive primitive tribal conditions, where being disrespected meant death by being cast out into a dangerous world, or relegated to getting the least food during famines, and even stopped from having children.

Even people who don't much care about following the law or about their oaths will hate being disrespected by anyone trying to keep them from following the law or following their oaths. They'll strike back by doing the opposite of what the disrespector is trying to get them to do.

If you ever have to protect your right to use this concept, explain that you're not trying to enflame jurors but to prevent anyone from enflaming them by pressuring them to violate their oaths. Judges who want jurors to follow the law would do well to use this same argument.

After massaging the jury instruction, do the dominoes demonstration. It's on p. 157.

After dominoes:

> When I sit down, the government gets to talk to you again. Listen to see if they logically and fully rule out each of your reasonable doubts. It's the only question.
>
> I have just one more thing to say: if your true belief is that there's a possible reasonable doubt, a maybe, then your true belief is the only thing you can go on. *You are not allowed to compromise* a true belief, such as a true belief that there's a reasonable doubt. So unless other jurors convince you that your belief is truly *wrong*, you cannot compromise—at least not if you want to stay within the law.

Justice in America heavily depends on all of us remembering this and sticking to it. For any jury to convict, not even one of the jurors can have the true belief that there's a reasonable doubt about anything the government must prove.

Folks, you sit here in a powerful position between the government and the individual. This might be the only place where just one person can keep the government from doing what it's trying to do, and the government must accept it. That's how much power the United States Constitution gives you. That's how the nation's founders designed it, and they knew all too well what happens when it's any other way.

Thank you for being jurors. Thank you for staying within the law.

Without jurors staying within the law, there is no justice.

Thank you.

The Dominoes Demonstration[3]

Within the smallest flick of a domino lies the potential for an extraordinary cascade, as one action sets off a remarkable chain that shapes the destiny of all.

—Anonymous

For want of a nail the kingdom was lost.

—*Poor Richard's Almanac*, 1758

You can view an online video of a dominoes demonstration by New Jersey attorney Edward P. Capozzi, who invented it (MalekpourBall.com). You might want to watch it before reading the following instructions.

Before doing the demonstration in trial, practice it—including what you say—in advance. Multiple times.

The dominoes demonstration spotlights the reasonable doubts and how to apply them, brings undecided jurors to your side, motivates your favorable jurors to stand firm, and helps arm them to fight for you in deliberations.

You'll need a set of white, thin-cardboard shirt gift boxes,

roughly 15” × 10” × 2”. (About a dollar each online, or buy a bunch of shirts and have them gift boxed.) The number of boxes depends on the case.

Like the title on the spine of a book, label both of the long, narrow sides of each box with its own topic (“Forensics”), fact (“Who Did It?”), or count-element (“Broke in?”), along with a large question mark or two, about which there are reasonable doubts. Make the labels as large as space allows.

Sample domino set:

CHARGE

Boston?

Eyewitness ID

Forensics

Intent?

CONVICT

All lettering, including on the spine, must be large and thick enough for every juror to easily read. (In extra-large courtrooms you might have to use larger boxes for the lettering to be large enough.)

When you have too many boxes to fit on the table, group two or more within the same label and mostly the same reasonable doubts —such as *Identity* and *Location* within a box labeled *Who?*

Also label a domino “CHARGE” (all uppercase) and another “Guilty” (upper- and lowercase).

This is your domino set. With multiple counts you might need multiple sets.

Before you start your closing, preset a long, narrow (12”–18” or so) table lengthwise across the front of the jury box, high enough for every juror to see everything you’re going to place on it, but not so high that it blocks their view of you. Normal table height will work.

You’ll also need a blow-up (not projected) replica of the verdict form to write on.

To begin the demonstration, take the CHARGE domino from a box under the table. (Preset the dominoes in the box to quickly find them in the right order.)

Without speaking, show the CHARGE domino around for jurors

to read the label. Then set the domino on the table and say:

This is the Charge domino.

Then set the others one at a time and in the sequence you'll discuss them, showing each one around and saying its name. Finish with the CONVICT domino.

Space them so they can topple each other over like dominoes and so that a missing domino would stop the toppling.

Then say:

These are the reasonable doubt dominoes. The state must prove there are no reasonable doubts in any of them.

When there are no reasonable doubts in a domino, the domino stays in place. When they all finish up still in place, then pushing over the Charge domino will push over the Boston domino, and so on until the Convict domino goes into action and drops.

When the government does not rule out every reasonable doubt in a domino, that domino is gone. Like this. Take away the Boston domino and hold it.

It leaves a gap.

Like a missing tooth.

When that happens, pushing over the Charge domino has no effect over here on the Convict domino. So it cannot fall, meaning you would not convict. Like this.

Remove the Boston domino and push over the Charge domino to show that the gap stops the action.

One gap anywhere along the line is all it takes to keep the Charge domino from going over. As long as it's still standing, your role is to acquit.

That means acquittal.

Let's start with the Boston domino.

Stand it back in place.

For the Boston domino to stay in place, the government

must rule out the logical possibility that John could maybe have been someplace else. In this case, the government cannot rule out that possibility. There's not enough evidence to rule it out. How can you tell? Because without abandoning reason, without abandoning logic, it's possible to think that maybe he was someplace else. At most the evidence shows that John might have been in Boston, or even probably, or one of you might think it's almost for sure—but *almost does not count*. It has to be *all the way* beyond reasonable doubt.

So if there's any logical possibility John might have been somewhere else, this domino goes.

Remove it.

During deliberations, if one of the jurors wants to leave this domino in place, make them tell you what evidence there is that logically rules out everywhere but Boston. When they cannot, then there's reasonable doubt about it. So this domino goes away. It's out of the case. Not enough evidence to rule out the reasonable doubt about whether John was in Boston.

Drop the Boston domino under the table and out of sight.

A gap. No matter what else happens, that gap stops the Convict domino from falling over. So you mark "not guilty."

Circle "not guilty" on the verdict form.

That's all it takes. One gap means no conviction.

But let's look at the next one anyway.

Now run through the next domino—Eyewitness ID—the same as you did with the Boston domino. Include all the specific reasons that the eyewitness(es) might be wrong. Many such reasons have been covered earlier (p. 161). Be sure to include that jurors have to go by what the witness *actually said*—the content—that rules out reasonable doubt about their testimony and not how they look or sound or dress or make eye contact and so on, because those things are not reliable guides. And remind jurors (they already know it)

that good liars are skilled at faking most of those things. So all they can go by is whether the witness *said* anything that rules out reasonable doubts about their testimony.

And explain that no matter how honest and certain the witness seems, *there is no logical way to rule out the possibility that the witness might be mistaken*.

Explain that in light of even one of these reasonable doubts, much less all of them, the Eyewitness domino goes.

So that's another gap. Like the first one, it stops the process. The reasonable doubts block conviction. The Convict domino won't go into action.

Next, use the Forensics domino in the same way.

So what about the DNA? I can see that some of you are way ahead of me here.

You already know that the government needs enough evidence to rule out the logical possibility that the DNA might not have been John's. If the government does not have enough evidence to do that, then there's reasonable doubt about whether the DNA is John's. So we have a new gap that stops conviction.

The only evidence saying that the DNA is John's comes from a government forensics witness. So she's the one who needs to prove it beyond reasonable doubt.

That means you have to ask yourself whether she ruled out all logical possibility that the blood might have been someone else's. That means she needs to have ruled out every logical possibility about whether she and everyone else involved in the testing process did everything in the testing in the right way. *It would not be logical to take that for granted,* so you need the government to prove it beyond reasonable doubt.

"Not logical to take it for granted" is a key phrase to use in at least a few places during closing.

So let's look at whether they did everything in the right way that was required in the testing process.

Go through each individual reasonable doubt about this (for

help with this, see, for example, the substeps section, pp. 45–46). One major area of reasonable doubt is about possible cross-contamination.

DNA testing involves two different blood samples. One is from the crime scene. The other was taken from John. The lab compares them to see if they match. A common cause of testing error is when even a tiny amount of one sample gets onto the other sample. That's called cross-contamination: one sample contaminates the other by mixing with it. You heard the government's own expert say under oath that that leads to false matches, that the test results would not be reliable.

We also heard together that the testing process of each sample can turn some of the sample into an aerosol—like spray from a spray can—that floats into the air, where it can stay for [*time*].

We heard that the lab can prevent this from happening and that the lab in this case tried to prevent it by filtering the air as it went through their air cleaning system.

What else did we hear? That the filtering works only if the filters are either purified or changed between testing the first sample and testing the second. And the filters had to be purified to start with. And set properly into place. And the vents to and from the filters had to all be verifiably purified.

And then we heard this: the government's forensic witness told us that she did not know of any evidence that ruled out all the reasonable doubts about whether any one of those steps might not have been properly taken.

So on just this single requirement of making sure that no aerosols from the first test floated into the air and later settled onto the second sample when it was being tested, there are four reasonable doubts. Each one of those doubts means the DNA match testing was not reliable. That means it could have been wrong. That means reasonable doubt. No matter what else the lab did right,

that air had to be purified beyond reasonable doubt, and they admit they have no way to rule out the reasonable doubt that maybe it was not.

This is no small reasonable doubt. Aerosol generated from the test carries trillions of DNA molecules into the room [*900 trillion, if you want a number*] , where they can later fall back onto the other sample. It takes nowhere near that amount to cross-contaminate DNA from one sample to the other.

And the witness from the lab admitted she cannot rule out the logical possibility of that cross-contamination. That's reasonable doubt about the DNA match, which means reasonable doubt about whether John did what the government claims he did.

Now cover the reasonable doubts about every other aspect of how the testing was executed, and those about anything else required for an accurate match.

***Make frequent use of the sentence "If someone thinks there's no reasonable doubt about this step, ask them to explain how they rule it out."

During closing, also cover other reasonable-doubt topics, such as the point that if there's reasonable doubt about something a defense witness says regarding a fact the state must prove, then there's also reasonable doubt about the state's corresponding testimony. This is how most of your witnesses will create reasonable doubts about the state's case even without convincing jurors that the state's corresponding witnesses are wrong, and even when the state does well in impeaching your witnesses. With this method the state must impeach well enough to prove beyond reasonable doubt that your witness's testimony is actually wrong. Otherwise there's reasonable doubt about it—which, when jurors understand this point, is all we need.

During the demonstration, incorporate all the reasonable doubts —or as many as you have time for—into the dominoes. Once you're finished with a domino, don't pick it up and go back to it. Do them all as you go. You'll often be amazed at how many reasonable doubts you can pile up in even a single domino.

Remember to recircle "not guilty" on the verdict form as you show each reasonable doubt.

At some point near or at the end of the demonstration, say something like this:

Any logical possibility based on the evidence is a reasonable doubt. So you can use any reasonable doubts you think of on your own. They all count.

Now go to the end of your closing (p. 149).

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1. The dominoes demonstration was originated by New Jersey attorney Edward P. Capozzi, who developed it to help prove proximate cause in plaintiff civil cases. His video demo of the Rule-Out version can be streamed at https://www.malekpourball.com/.

2. *The Domino Theory*, second edition Edward Capozzi.

3. The demonstration is adapted from New Jersey attorney Edward P. Capozzi's concept of using dominoes to demonstrate proximate cause in civil cases.

Chapter 13

Focus Groups

By Artemis Malekpour

Maximizing Results on a Minimal Budget: Developing Your Rule Outs through Cost-Conscious Focus Groups

Focus group research—when done well—is a valuable tool in any trial lawyer's treasure chest. But while many attorneys now deem it a necessity in any case they do on the civil plaintiff's side, focus groups are still considered more of a luxury item in criminal defense work.

Here is your strong encouragement to do focus groups in your criminal cases as well. We'll cover why they're needed, in case it's not so obvious to everyone (or if someone on your trial team needs more convincing). But we also acknowledge that there are more hurdles to focus groups in the criminal world, particularly when it comes to funding this type of research. So we'll talk about ways to get around that obstacle, because focus groups *are* so important in criminal defense work, especially when using the Rule-Out method. That's where the brainstorming for reasonable doubt really kicks in. But let's start with the first justification for doing focus groups in your criminal cases.

A Spotlight on Your Client

Whether your client takes the stand or not, merely by sitting there in the courtroom next to you, your client becomes your star exhibit for many jurors trying to decide on guilt. Oftentimes, what your

client looks like, how dangerous they appear to be, what creepy vibes they give off, and how they're sitting, listening, interacting, and even simply blinking or breathing can factor a great deal into jurors' thinking about what your client did or did not do. That's reason enough to do a focus group in a criminal case.

Look for different ways in a focus group session to show your client. That's easy enough if there's police body cam footage or an interrogation or some other video recording that's coming into trial. But even then, your client "in action" is not the same as your client at rest. So we need to test that image too.

One way is to present a photo that's representative of how your client expects to look in the courtroom. Another route to take—video record your client in some sort of setting (whether from a previous recorded proceeding or something you set up specifically for research's sake) where your client is simply listening to instructions or opening statements or someone's testimony. Everything is getting analyzed by jurors. It's not just about what facial expressions your client might make or how upset they may get as they hear certain things. Jurors have opinions about your client taking notes (not only whether, but also when) and the clothes your client's wearing (suit, polo, cardigan), as well as your client's hairstyle (e.g., short, long, cropped, crewed, pinned back, pulled into a bun, ponytailed) and facial accessories (e.g., full beard, moustache, goatee, sideburns, piercings, tattoos). You want to find out what those focus juror impressions are *before* you put your client in front of courtroom jurors to be judged.

Another benefit: if you are not sure whether your client should testify, a focus group is a good way to test that. Under the protection of attorney work product and confidentiality, you can put your client through a direct exam and "hard" cross, similar to what cross-examination at trial would look like. Then—after jurors have already had a discussion about the prosecution's case and whatever witnesses (if any) you intend to put on in your case—play that video for the focus group. You want to see what your jurors think about your client and how the strength of the criminal case is impacted by what jurors might say or conclude about your client from the video clips. But you've got to compare it to their "baseline" thoughts on the case, before they've heard from your client. Always be mindful of the order in which you present focus group jurors the information, and remember to collect data on their responses before you add another element to the mix.

Brainstorming and Stockpiling Rule Outs

Here's another justification for doing focus groups. There are two big problems that we have when it comes to how jurors make their decisions in criminal cases.

The first one we hear often in focus groups, as well as post-trial interviews: "The evidence was not enough, but it was sufficient for me to convict." Several years back, in an exit interview conducted after focus group jurors had deliberated to verdict, here's how that conversation went:

> Juror 1: There were a lot more things that would have made it easier to determine, but with what evidence there was, they made it seem like Castle was an elderly man who was on medication and that was an excuse. But that was not an excuse. If he was in that bad of a shape, on oxycodone, he should have retired and stepped down. He wasn't able to do his job. He had been an official long enough. He knew right from wrong. And he should have been taking more responsibility for his sheriff's office and his deputies and keeping up with his sergeants and lieutenants and what was going on and digging deeper into that.
>
> Interviewer: You said from the evidence that was presented, it made it hard to determine?
>
> Juror 1: It wasn't enough, it seemed like, if I had known more, like how the tips came about. Not knowing . . . you don't know what's true and what's not true when you don't see it with your own eyes. You are just hearing things and seeing things—seeing is believing sometimes, but it's always you'd like to have more evidence than you do.
>
> Interviewer: Was there something that could have been presented that would have swayed you the other way?
>
> Juror 1: For one, the tapes weren't that audible, and if there had been more of the tapes and more of a confession, more . . . more conversations with the federal agents and with Mr. Castle. More information would have helped more, I think. But it was sufficient as it was for me to determine what I did.

So this is a juror who has doubts. She's not beyond reasonable doubt. She needed "more," but it was enough in her mind to convict, based on what she believed was needed to convict. There

were tips that had come in that the prosecution had relied upon but that she wasn't sure about, whether to trust them, not knowing how they came to be. She wasn't really able to hear what was being said on tapes that were presented as evidence of the defendant's wrongdoing. This was all part of the prosecution's case and burden. And these were doubts that this juror was having. But she was willing to let the prosecution off the hook and convict.

Using the methods you learn from this book, you want to transfer the doubts this focus group juror reeled off onto a growing list of reasonable doubts that the prosecution did not rule out—the possibilities, the other things that could have explained what happened here to show how the prosecution has not met its burden. That's how we use what we learn from these focus group jurors.

What this exit interview also teaches us is that the prosecution's burden is often lower than it should be: there were a lot of questions that the jurors still had, but they still convicted because they didn't understand what they were required to hold the prosecution to.

The second big problem we encounter in criminal cases is demonstrated in another exit interview from this same criminal case. It's this idea defense attorneys often cling to, of the defense needing to commit to their own story or an alternative version of the prosecution's tale. So the case inevitably boils down to "believe what they say or believe what we say," and now we've taken on a burden that means, in order to return a verdict of not guilty, we need to prove to you that we're right. (And note: if jurors aren't sure which story to believe, the tie very rarely goes to the criminal defendant.)

> Interviewer: So you said something a few minutes ago about waiting three months between . . . can you talk about that for a second?
>
> Juror 2: I feel like, with the whole sting operation, they had these first three conversations, and it didn't go the way they wanted it to go, so I feel like the plan kind of failed. But, I don't know why, but I feel like the FBI really wanted to get him for some reason that I don't feel like we've been told, that we've been presented with. Like the defense said something like, they wanted publicity for the case, but that's really stupid, that doesn't really make any sense.

So the defense put out a theory. This juror thought it was stupid. She thinks there's something about the case that's giving her doubts,

but she's ready to dismiss them because she doesn't really buy what the defense wants her to believe. That's not the defense's burden to have to prove, but that's how it was presented to this juror, or at least how she heard it. If the defense feels so compelled to throw out theories, a better framing would have been "Maybe the FBI was out to get him for publicity's sake, maybe there's some other reason —either way, the prosecution hasn't proved its case." That's where we want jurors to take those doubts that are gnawing at them, that they should continue to hold on to, until and unless the prosecution rules each one of them out.

With the Rule-Out method, again, you're collecting all those doubts, what other ways there are to look at this, what other possibilities there could be. You want a running list. So here are some questions to ask when doing focus groups of any kind in a criminal case:

- What do you think happened?
- What makes you think that?
- How else do you think it could have happened?
- What else could explain it?
- Is there another way to look at the evidence?
- Where are there holes or doubts, even just a little?
- What are they?
- What else?
- What might change your mind?
- What might others you know think about this case?
- If others decided "not guilty," what might their reasons be?
- In hearing this case, what worries you?
- How could this affect your world?
- What else would you want or need to know in coming to a decision either way?

Often what drives a guilty verdict (and jurors' willingness to lower the prosecution's burden) is fear that this horrible crime could happen to them, so they want to convict to remove that threat from their world. Even if jurors aren't sure whether the defendant did this particular crime, too often they believe the defendant looks sketchy or scary enough to commit some crime. So they see a guilty verdict as a preventative measure of protection for society (i.e., themselves).

Here's how discussion unfolded in a different case involving a Marine and whether he performed any sexual acts on his young son based on text conversations he was having with a woman named

Haley (essentially, someone he was sexting):

Juror 1: Like you said, there's weird people everywhere.

Juror 2: Yeah, but that's with a child.

Juror 1: That still hasn't been proven.

Juror 2: What's that? That it isn't a child?

Juror 1: There's no picture proof there that it's a child.

Juror 2: There isn't proof that you *want* to sit there and say it isn't a child, but there's proof—there isn't proof that *you* don't want to say it's a child. But there's proof that there's a lot of individuals that want to say it's a child. Like she said, reasonable doubt. You doubt that it's not a child. I—I think it's a child, and I really feel that it's a little boy that's two years old, because he's sending pictures, he's doing all this. This is what I believe, and you have a different belief, and we're all respectful of that.

Juror 1: I'm saying it just lacks proof to prove that he's guilty.

Juror 2: It lacks proof for you and all the other individuals who believe what you believe.

Juror 1: If someone comes to us and just off of what is here, just texts . . .

Juror 2: Oh God, yes . . . .

Juror 1: . . . you would want them to prove beyond a reasonable doubt that you committed these things if you knew 100 percent that you didn't do it.

Juror 2: An individual that's letting their son . . . I have a son. When I sat there and thought about my child at two years old, and I'm texting another individual about my child, and what I'm doing with my child, I'm sitting there saying to myself, one, that's a sick individual and two, I'm not going to do that. And I'm not going to communicate with you anymore, and I'm not going to sit here and say can I see you and all this stuff. I'm going to end the conversation. I'm

going to type back and say f*** you, I'm done. That's just me.

Juror 3: It would make the case much stronger, and I think there wouldn't be hesitation if there were video confirmation. And I think the fact there is no video confirmation and there's no Haley . . . I think that definitely does bring in some doubt. But then you have to make the decision of whether you need more evidence or whether . . .

Juror 2: But it's in my phone.

Artemis: How many people think, no matter how much you believe your side, how many people could see a reasonable possibility that other people might believe, even if you don't believe it?

Juror 4: Who understands why we have doubt.

Artemis: That's much better articulated. How many people see the doubt, even if they don't have it?

Juror 4: One thing that's irrelevant but . . .

Juror 1: I see from your point of view.

Juror 2: I can see from yours as well.

Juror 1: I think it's wrong.

Juror 4: The three strongest opinions on the case of the prosecution have kids.

Artemis: How many people have kids?

We've got some doubts working here, but we've also got some personal concerns and biases that go beyond the case facts. We know that's going to happen.

So, separate from their lively debate, I asked these jurors to complete a written questionnaire that included this question: "If you were the defense attorney, what alternative reasons or possible arguments would you give to help explain what you've seen so far to weaken the prosecution's case (even if you don't believe it to be true)?"

Here are some of their responses:

- Where's the video evidence that it actually took place?
- Is he being framed for a crime he didn't commit given he recently went through a divorce?

Note that these are possibilities the prosecution never ruled out. These are what get added to your running list. Here's more from their response forms:

- There's no video proof of what was going on and whether or not they were role playing.
- Someone else may have stolen his passwords and was the one sending the messages.
- Show me the proof! Messages are not enough to convict.
- Maybe he was being manipulated, but that doesn't mean he committed these acts.
- Maybe there was phishing of Nick.
- Maybe someone hacked his phone?

Other questions I included on their response forms to get at those possible reasonable doubts:

- What would you need to see to convince you that what the state is saying is the only alternative?
- What else could explain what happened?
- What else is possible?

My Cousin Vinny is a masterful, must-see film for so many reasons. But for our purposes here, next time you watch, note how Vinny frames his questions to set up reasonable doubts. He tries only to show that the state's witness might be wrong: "Is it possible . . ." frames most of his questions.

There isn't a single burden that Vinny takes on. Nothing he says that he then has to prove. Every question is framed as "Is it possible?" And every question raises a reasonable doubt that the prosecution is then required to rule out. (Note, at the end, he does wind up doing the prosecution's work for them by leading them to the real killers, but it's a movie, and they couldn't leave their audience hanging like that.)

So all the doubts that you get from your jurors when you are doing a focus group, write them down. Where they had questions. Where they needed more information. That's the setup for the Rule-Out method.

In the focus group about the Marine, the prosecution never ruled

out whether the sexual acts actually took place or if the defendant was just role-playing; whether he was being manipulated; whether someone had hacked his phone, stolen his password, and sent the messages in his place; whether he was being framed because of his job or past relationships; and so on. The prosecution never ruled out all those doubts.

Brainstorm every chance you get to continue to grow your list. In a recent listserv post, with a different child molestation case, the attorney was wondering what reasonable doubts there could be. Here's the list of possible doubts that began to generate:

- Maybe it was the child's imagination.
- Maybe the accusation resulted from a suggestion made by someone else.
- Maybe the child heard something or read something, and now they are relaying other people's experience as their own.
- Maybe there's a disgruntled parent or other family member.
- Maybe this accusation is a vindictive act.
- Maybe there are potential hurt feelings from a past slight.
- Maybe these are attention-seeking cries for help.
- Maybe the child is transferring something that someone else did to them onto what's perceived as a safer target in the defendant.

Your job is to raise those doubts. It's the prosecution's burden to rule them out.

The Mechanics

Assuming by now you see the benefits of a focus group, let's turn our attention to the different types you can do. There are the more formal deliberating kinds of focus groups that involve more time (around 8.5 hours per case or longer) and more people. These also tend to require more resources:

- You need to find a representative group of jurors (or hire someone to do so) in the venue or somewhere very similar (in case your pool of trial jurors is small or there's been too much publicity in the venue). Craigslist and temp agencies won't cut it. Neither will a group of college students. But if you're tight on money, you can find groups within the community (church, Kiwanis clubs, local organizations, people who know people who can find people) who are

willing to participate and can provide more diversity of thought and experiences. Advertisements on kiosks or (especially) contacts within the clerk of court's office can also be effective methods of recruitment.

• You need a facility that can hold the session, with a presentation room large enough for all your jurors, several breakout rooms for the smaller deliberating groups, and an observation room that's out of jurors' sight where you can monitor how deliberations are going without interfering with the process. Schools are great locations after hours, on weekends, or during the summer months when there are no classes. Community centers or churches may also have the space you require to avoid the expense of renting from hotels or convention centers.

• You need several cameras and recording equipment, along with a videographer or A/V consultant who knows how to set it all up so you can watch all the deliberations for analysis in the days or weeks that follow. This may be your biggest financial investment, depending on the number of breakout groups you have, how technologically challenged your legal team is, and the equipment available. But there are still cost-saving measures you can take. You don't need a full crew in each room—just a good tech-savvy person who knows about wide-angle shots to get everyone in the frame, the importance of sound quality, ways to reduce noise interference, and how to (reliably) hit record, along with plenty of time to put everything in place and test that it's all working.

• You need food and drinks to keep your jurors' energies up and their moods content. If you're holding your session at a site where you can go rogue on the catering, a Costco or Sam's Club membership can keep your folks happy and their bellies full enough to focus on their tasks at hand at a discount price.

• And you need to pay your jurors an amount per hour that will incentivize a representative sample to show up and participate. Note there are some groups that will accept a lump donation to their charity or cause in exchange for their members' (or members' friends') participation, which can be cheaper than individual payments to jurors (which are typically based on the venue's median household income). The longer you have them, the more you need to pay. But if you find a centrally located site with free parking or easy

access to public transportation to conduct the session, you may not need to cover gas or parking expenses.

For these more formal deliberation sessions, you can gather as many as 24 to 32 jurors in the presentation room. They all hear the same case with an initial neutral overview, followed by the laws that they'll apply, the prosecution's case, and then whatever defense case you choose to present. They complete response forms along the way,[1] then get sent to individual breakout rooms with a verdict form (with anywhere from five to eight jurors within each group). That's where they pick their foreperson (however they choose, which can be interesting and telling in itself) and deliberate on each verdict question to come to a unanimous decision.

It's the process you want to pay the most attention to and how they get to the end, rather than what their end result actually is. What was important to them, what changed minds, who were the leaders, where'd they get stuck, and how well did you guess any of that before deliberations began (to test your own understanding of who jurors—aka people—are, what they're going to care or be concerned about, what motivates them, and how they'll view or understand your case or client)?

A less formal but still effective way of testing your case through focus groups is with a discussion session. Discussion groups are moderated sessions, often expanding to issues beyond the verdict form questions. They involve less time (4 to 4.5 hours max) and fewer people (anywhere from 8 to 16). They can also be done either in person (with two rooms reserved for presentation and observation, a one-camera setup, and energizing snacks) or by Zoom (which has potential for more headaches, with individual home internet issues and attention challenges, but the benefit of much lower costs).

A great advantage to discussion groups is the flexibility they allow. Figure out first what you want to test, then determine how best to test that. Do you want to present a short overview of the case, engage in discussion, then layer in more evidence and arguments for more discussion? Or maybe the better way to achieve your goal is by presenting a summary of each side so jurors have all the information before you open it up for moderated discussion?

Sometimes one of the decisions you need to make for trial is how much evidence you want to let in. Here's an example of how to test that from a Virginia case involving sexual abuse allegations against the alleged victim's (since divorced) stepfather.

The defense attorney had to decide how much of a mess he

wanted the case to be, and a lot of that depended on how much of the years of family drama he let in and whom he put on the stand. We needed to know whether the "full sh*t show" (as we affectionately called it) was helpful to raise reasonable doubt or not. So we first presented the clean, skeletal version of the case—what we believed would certainly come in—then layered in each piece of information that might or might not come in; to see how each layer of the "sh*t show" influenced jurors' opinions, we had them complete response forms and held discussions each step of the way. By listening to assumptions they were making, which ways they were leaning, and what caused complete flip-flops of doubt at each decision point, we got a far better understanding of what we needed to fight to keep out and what we could allow in.

However you decide to present the evidence and arguments, the most effective way to start a discussion is by asking: "Thoughts?" Then wait for someone to begin to talk. Avoid the temptation to direct the discussion where you want it to go or artificially set jurors on a path that was not their own. Always pay attention to who spoke up first and what they wanted to talk about, because where they go (and how much time they spend there) is what they believe to be most important. Even if you have a whole list of topics you want to address, resist that urge to steer the conversation (unless you've discovered the magical way to do the same in the deliberation room at trial as well). The point in discussion groups (as well as trial voir dire, by the way) is to get jurors talking and get out of their way. Eventually you can come back around to your topic list (which should be in order of priority). But you've got to be willing to relinquish control at the outset to get to the gold at the end.

Be wary of presenting or moderating your own focus groups (whether deliberations or discussions), as you have a bias that will be exposed, no matter how hard you try to stifle it. Better to find someone who knows nothing about the case (and even nothing about the law) but does well in front of groups and with people in general. Give them the information they need, and they can run the session on their own. No need for more than one person to conduct the session, or else you're at risk of dueling personalities that will influence jurors' decision-making (with personalities that don't even match what jurors will encounter at trial) rather than decisions made on the case itself. Too many factors can influence a person's opinion, so you want to control as many of them as you can.

Alternative Routes

Let's say you don't have the resources necessary to do either formal or informal sessions (in person or by Zoom). The other (really cheap, even free) kind of "focus group," especially in criminal cases, is hitting the town and simply talking to people. You can find folks darn near anywhere—coffee shops, bar counters, malls, food courts, buses, planes, parks (whether they be for humans or dogs), your kids' sports events, tailgating before a college game, even just sitting outside catching some sun rays during a lunch break. Catch their eye and ask them if you can run something by them. Maybe even buy them a cup of coffee or cover their lunch check in exchange for their feedback.

Most people enjoy sharing their opinions, and they're eager for people to *attentively* listen to what they have to say in a way that makes them feel important and respected. And it's great practice for you to learn how to approach and talk with strangers (and get them to talk to you) without creeping them out. That's a super important skill for you to develop and fine-tune, especially if you get voir dire, and particularly in these times where there may be more division, isolation, anxiety, and reluctance for people to engage with others within your community. You also gain good practice in summarizing information quickly and in a way that people can understand.

Another route to go that's not as ideal but still can be useful—presenting a brief summary of your case to neighbors, friends, and family. We're talking about people who already know you and what you do. They may be weary from hearing about your cases over the years (or no longer care to hear you talk about work in general). So tread carefully. But my guess is that, somewhere within your group, you have people who are fascinated with the law and love to hear about what cases you're working on currently.

You can also get great—free—insights from message boards and podcasts that discuss different types of criminal cases. It might not be your case if it hasn't gotten publicity, but you might be working on something similar, and you can pull ideas of doubts that jurors might have that the prosecution never bothered to rule out. It's the "what about this?" or "they never explained that" posts that should pique your interest.

One last space that's becoming a little harder to come by but still worth the look: reader comments from news articles. Some news organizations now will disable their comments section because the "discussion" can get messy and downright nasty. But those same articles often get posted elsewhere on social media, like Facebook, X

(formerly known as Twitter), or Reddit groups, and it's a free-for-all in the comments that follow. So search and gather them all, as they can give you a good idea of what your trial jurors may think about your case and the reasonable doubts they raise.

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1. Email me at artemis@consultmmb.com for a sample copy and guidance (off the clock).

Chapter 14

Reasonable Doubts in Sex Crime Cases

By Susan Seahorn

This guide for sex assault cases will help you see the number and range of reasonable doubts in most kinds of cases. Add these to the reasonable doubts common to every case—such as those about witness observation and memory, biases, mistakes, forensics, and so forth. (Susan Seahorn is a longtime North Carolina assistant and then chief public defender and role model for the field. She's now consulting in sex assault cases. Further biographical and contact information is on p. 190.)

- The prosecuting witness wants something that belongs to the accused, like his house or car.
  - ○ She has no place to go and needs a place to live.
  - ○ She wants his other property like his car.
  - ○ She has moved her family into his house and now wants him out.
  - ○ Prosecuting witness is about to have a custody hearing and needs a stable place for her children in order to receive custody.
- The prosecuting witness wants a relationship with the accused, and he is not willing.
  - ○ Prosecuting witness told a friend that he spurned her.
  - ○ Accused told prosecuting witness that he wouldn't date her because she had had sex with too many people he knows.
  - ○ Accused did not call her after he had sex with her.
  - ○ Accused did not tell her he loved her after he had sex

with her.

• The prosecuting witness wants a U visa, which allows someone who entered the United States illegally to gain legal status by accusing someone of and being willing to prosecute them for a major felony.

○ Prosecuting witness is the only person in her family, including her children, who does not have legal status.

○ Prosecuting witness has a relationship with someone in the United States that she wants to stay with.

○ Prosecuting witness fears deportation and this is the only means for legal status.

○ All of prosecuting witness's family in the other country are dead or have left.

• The prosecuting witness is protecting a relationship with someone else.

○ Prosecuting witness has a longtime boyfriend and she is afraid he knows she had sex with the accused.

○ Prosecuting witness is married and someone saw her with the accused.

○ Prosecuting witness is married and fears discovery by other family members.

○ Prosecuting witness knows someone has seen her in a compromising position with the accused.

○ Prosecuting witness knows that someone saw her in a location that would indicate improper behavior on her behalf, like inside or leaving her bedroom or her house with the accused.

• The prosecuting witness did not really want to have sex but did not verbalize that, then talked to a friend about it who convinced her that she had been raped.

○ Many young women have come to believe that if they do not want to have sex, it is not their responsibility to say no.

○ Prosecuting witness's friends will think badly of her if she had willing sex with the accused.

○ Prosecuting witness was not in the mood for sex and talked about it to a friend who has given her the opinion that it was rape.

○ Prosecuting witness asks a friend if she did not want to have sex if that is rape and the friend says it was.

• The prosecuting witness is ashamed that she agreed to have sex with the accused.

○ Prosecuting witness is feeling morally that she should not have had sex with the accused.

○ Prosecuting witness was drinking too much and is embarrassed that she had sex with the accused.

○ Prosecuting witness was doing drugs and is embarrassed that she had sex with the accused.

○ Prosecuting witness did not have the emotional strength to tell the accused no.

• The prosecuting witness had blacked out and does not remember consenting to sex. If someone quickly drinks a lot, they lose the ability to encode memory despite functioning physically in a normal way for some period of time.

○ Prosecuting witness was playing drinking games over a short period of time.

○ Prosecuting witness was drinking and doing drugs over a number of hours.

○ Prosecuting witness was seen to be physically functioning normally during the time she says that she had passed out and the accused took advantage of her.

○ Prosecuting witness has no memory of the time during which she is saying she was raped.

• The prosecuting witness is angry with the accused over something.

○ Prosecuting witness was not given something she expected.

○ The accused did not do something that the prosecuting witness expected.

○ The accused is seeing someone else.

○ The accused did not do what the prosecuting witness wanted him to do.

• The prosecuting witness wants attention.

○ Prosecuting witness has made accusations before and enjoyed the attention.

○ Prosecuting witness is a drama queen.

○ Prosecuting witness has made the accusation and is now afraid to take it back.

• The prosecuting witness may have a personality disorder.

○ Borderline personality disorders can include a fear of abandonment, so the person will often try to harm someone they believe is going to abandon them.

○ Borderline personalities often are very aggressive in how they treat others.

- The prosecuting witness may have a mental disorder that interferes with decision-making.
    - ○ People suffering from bipolar disorder often experience sexual mania, which results in their desiring and pursuing sex with multiple partners.
    - ○ People who are bipolar often make bad decisions.
    - ○ People who have ADHD often make spontaneous bad decisions and later regret the consequences.
- The prosecuting witness was trading sex for drugs and wanted more than the accused would give her.
    - ○ Has she had a history of prostitution?
    - ○ If she has a history as a long-term drug user, she has likely traded sex for drugs in the past. Who might know about that?
    - ○ Has the prosecuting witness told her friends that she was trading sex for drugs and wanted more?

In cases involving a child prosecuting witness, again "prosecuting witness" hereinafter, the possible reasons to doubt the prosecuting witness's credibility can include:

- An adult wants custody of the child and is manipulating the child.
    - ○ Mom and Dad are getting divorced, and Mom or Dad wants custody.
    - ○ Mom and significant other are splitting up, and Mom wants a way of getting rid of the accused.
    - ○ Grandmother or other family member wants custody of the child and disapproves of the accused's relationship with the mother so is getting two things for one accusation.
    - ○ Grandmother or other family member does not want the accused to have custody of the child.
- An adult who has been sexually abused often questions the child about possible abuse. Children want to please adults and will go along with what an adult seems to want to hear.
    - ○ Mom routinely questions the child about abuse. Child senses that Mom doesn't like the accused or is in a dispute with the accused and so says what they think Mom wants to hear to side with Mom.
    - ○ Another family member routinely questions the child about abuse because the family member disapproves of

the accused and the child knows that.

○ Child is hounded by these questions and believes that he or she is giving the wrong answer to what the adult wants to hear.

• The child is angry at the accused and is getting back at them through the accusation. This occurs mostly with teenagers.

○ Child was punished by the accused.

○ Child did not get to do something the child wanted to do.

○ Child does not like the accused's relationship with the other parent figure.

○ Child is jealous of another child over something.

• Children under 14 really have no concept developmentally of how an accusation of this magnitude affects and harms someone else.

○ Thus, child may want to please the questioner and does not realize the potential magnitude of the accusation.

○ Child has misinterpreted something that the accused did or that the questioning parent is asking about.

○ Child is confused about something that happened.

• The prosecuting witness has had a class in school about good touch and bad touch and has misinterpreted something innocent as a sexual assault.

○ With some children, this is a new concept, so they are searching their lives for it happening to them.

○ If the child is being questioned, the child may believe the parent or adult has some reason to believe that something did happen that was wrong according to what the child was told.

• The child has been improperly questioned by some authority figure, often someone involved in assessing the allegation, such as a child medical interviewer or police. You can often observe this happening when watching a video of an interview and you see the interviewer suggesting answers to the child, who goes along with them.

○ An accusation might begin with one or two allegations and grow over time.

○ The time, places, and actions might change in order and gravity.

○ Other children might start to be questioned and have suggestive things said to them.

- The child has been abused by someone but is misidentifying the accused because they are fearful of the other person.
    - If someone they do not know or trust has abused them, the child may believe that telling, but not revealing the scary person, will get them help. But they do not realize that blaming a person they are not afraid of will harm that person.
- The child's story makes no sense in its description of the offense and how it was alleged to have occurred.
    - Is it physically possible?
    - Does it make sense, given that other people were present or were close by and would likely have seen or heard?
    - Were other people in a position to see or hear?
    - How many people were around?
    - How small was the place alleged to have been the location?
    - How were the physical arrangements of the layout?
- The child does not claim pain as part of the accusation; when penetration occurs, there is rarely any lubricant, so there would be pain.

This is not an exhaustive list of possible reasons to doubt the credibility of the prosecuting witness or their story, which is why it is important to speak with all the people who have contact with the prosecuting witness. These people will reveal the motives and influences that come to bear on the prosecuting witness and the accusation. One never knows what one will uncover when doing a thorough investigation of a case, but there is gold to be mined in these people, family and friends of the prosecuting witness.

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Mr. Abrams has tried and won multiple state and federal trials. And he has successfully utilized the Rule-Out method in a first-degree murder trial, in which the FBI was the lead investigative agency, as well as in a separate federal criminal trial.

In 2023, Mr. Abrams won the Public Justice Trial Lawyer of the Year award for obtaining the largest trial verdict in U.S. history in a wrongful conviction case. He has also successfully litigated a number of appeals and licensing board trials, and he has represented multiple people accused of wrongdoing by the NCAA, including a former head coach of an ACC basketball team.

David Ball has guided criminal defense and civil plaintiff's cases for 32 years, including on more than 50 capital cases. He's written four bestselling advocacy books, teaches CLEs and public defenders' offices and the JAG Corps at Camp Lejeune and Fort Bragg, and taught for Federal District 1 judges. Trained in science, engineering, and research, he's also spent a large part of his career in professional theater as a director and playwright, and his theater students have gone on to win Oscars, Emmys, and Tonys. He received NCAJ's Charles L. Becton trial advocacy teaching award and taught at such law schools as Duke (Senior Lecturer), the University of North Carolina, Campbell (Adjunct), Loyola (Los

Angeles), and the University of Minnesota. He's been part of a research project into criminal juror decision-making funded in part by the National Science Foundation (NSF) and conducted by Duke University's Institute for Brain Sciences (DIBS).

Emilia Beskind, admitted to practice in the District of Columbia, Louisiana, and North Carolina courts, has tried many serious felony cases to successful results. Ms. Beskind also trains lawyers in courtroom skills at the annual Anthony G. Amsterdam Capital Post-Conviction Skills Seminar and for the National Institute for Trial Advocacy and teaches CLE seminars on criminal defense for the Eastern District of North Carolina Federal Defenders and the North Carolina Advocates for Justice. She has written and conducted training for David Ball, a nationally recognized expert in jury behavior and selection. A member of the International Society of Barristers, National Association of Criminal Defense Lawyers, and the North Carolina Advocates for Justice, she has also served on the Board of Directors of the Duke University Law Alumni Association and been a featured speaker at Duke Law School. She has written for the *North Carolina Bar Journal*, contributed to David Ball on Criminal Defense, and co-authored The North Carolina Rules of Evidence with Objections.

Edward P. Capozzi is certified by the New Jersey Supreme Court as a civil trial attorney. He is a partner and chair of the personal injury department at Brach Eichler, LLC, in Roseland, New Jersey, and is the author and creator of *The Domino Theory* and *The Domino Theory*, second edition, published by Trial Guides. He regularly lectures nationally on trial techniques and cross-examination of defense medical experts. In 2014, Mr. Capozzi received the *New Jersey Law Journal*'s Personal Injury Hall of Fame Award for receiving the largest verdict in the state in a products liability case and from 2012 to 2022 received at least one and as many as three of the state's annual top 20 verdicts or settlements. In 2018, he achieved the highest settlement in an auto case in the state of New Jersey and is presently handling cases in 11 states. He is the past president of the New Jersey Association for Justice (NJAJ). Mr. Capozzi exclusively handles auto, trucking, elevator, and other catastrophic personal injury cases. He's married with four children living in Kinnelon, New Jersey.

Trial lawyer **Roger Dodd** has continued to represent clients in legal matters since 1976 (47 years) in states all over America. He is licensed in five states, federal court, and military courts and has

been admitted pro hac vice in other jurisdictions. He is one of a small select group of lawyers to hold the distinguished Super Lawyer rating in multiple states at the same time. He still tries civil and criminal cases. He is a frequent guest and commentator on television and other media programs. Mr. Dodd has been a lecturer, expert witness, and teacher in all 50 states. He provides specialized individual training (www.doddlawclinic.com) and trial lawyer coaching (www.rogerdoddtriallawyercoaching.com). He is a partner with Dodd and Burnham in Valdosta, Georgia; in the Jacksonville, Florida, plaintiff law firm Spohrer & Dodd; and the firm of Dodd and Kuendig in Park City, Utah.

Richard S. Jaffe of the Birmingham, Alabama, law firm of Jaffe, Hanle, Whisonant & Knight, PC, has been certified as an NBTA Criminal Trial Specialist since 1984. He and his firm have represented thousands of individuals in state and federal courts and taken hundreds of cases to trial. He was lead counsel in gaining the acquittals of three death-row inmates by juries at new trials. He has handled over 70 death penalty cases, including six federal ones. For 14 months he served as lead counsel for Eric Robert Rudolph (Olympic bomber). In 2013, Super Lawyers listed him as one of the top 10 lawyers in Alabama. Mr. Jaffe served four terms on the NACDL Board of Directors. He is a fellow of the American College of Trial Lawyers (ACTL) and author of *Quest for Justice: Defending the Damned* (2nd ed. 2020, NACDL).

Artemis Malekpour, a partner in the national litigation consulting firm of Malekpour & Ball, consults on a wide variety of cases across the country. She is particularly known for identifying and remedying case weaknesses. Before earning her degree with honors from Duke Law School, she worked in the Department of Psychiatry at the University of North Carolina Hospitals with children and adolescents coping with psychiatric disorders. She began her litigation consulting career while in law school with a series of interviews with jurors who had served on capital murder trials and by now has spent nearly 20 years working on trials and conducting focus groups, probing juror responses to almost every kind of case.

Susan Seahorn was born in East Tennessee and attended the University of Tennessee at Knoxville and the University of Tennessee College of Law. Admitted in several states, she initially represented clients seeking postconviction relief through parole or reduction of sentences. She then worked in the federal defender's office for the Northern District of Florida, as an assistant public

defender in Fayetteville, North Carolina, and in the research division of the North Carolina legislature and then joined the federal defender's office for the Eastern District of North Carolina. She again served as a North Carolina assistant public defender in Greensboro, then in Chapel Hill and Hillsborough, and was finally appointed as chief public defender in 2017. During her 32 years in the public defender system, Ms. Seahorn represented many people charged with sex offenses, murder, armed robbery, and other serious as well as minor felonies, trying numerous cases to verdict with good results by reduced charges and acquittals. Ms. Seahorn then worked with the North Carolina Indigent Defense Services, consulting with defense attorneys on sex crimes, and is also consulting privately. You can contact her at dubsandseahorn.com.

Shannon Tucker obtained her law degree from the University of North Carolina School of Law. She has served Durham County as an assistant public defender for over 28 years, representing clients charged with serious felonies and homicides. As a young girl she dreamed of becoming an actress, an author, a psychiatrist, or a teacher and managed to find a career that utilizes all of these skills. She has appeared on Court TV, has successfully argued cases in the North Carolina Court of Appeals and the North Carolina Supreme Court, and has helped innumerable clients gain their freedom. She enjoys traveling with her family, gardening with her husband David, cheering on their daughter Carson at polo and field hockey, and curling up with a good book and their dog Tim.

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